

# TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1960

No. 212

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MOSES LAKE HOMES, INC., ET AL.,  
PETITIONERS,

vs.

GRANT COUNTY.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR CERTIORARI FILED JULY 5, 1960  
CERTIORARI GRANTED OCTOBER 10, 1960

No. 16234

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**United States**  
**Court of Appeals**  
for the Ninth Circuit

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MOSES LAKE HOMES, INC., Appellant,

vs.

GRANT COUNTY, WASHINGTON, Appellee.

GRANT COUNTY, WASHINGTON, Appellant,

vs.

MOSES LAKE HOMES, INC., Appellee.

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**Transcript of Record**

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Appeals from the United States District Court for the  
Eastern District of Washington,  
Northern Division

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United States District Court for the Eastern  
District of Washington, Northern Division

Civil Action No. 1667

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CERTAIN INTERESTS IN PROPERTY IN  
GRANT COUNTY, WASHINGTON; MOSES  
LAKE HOMES, INC., a Washington corpora-  
tion, LARSONAIRE HOMES, INC., a Wash-  
ington corporation, LARSON HEIGHTS,  
INC., a Washington corporation, THE NA-  
TIONAL BANK of COMMERCE of SEAT-  
TLE, a corporation, SECURITIES MORT-  
GAGE, INC., a Washington corporation, IN-  
STITUTIONAL SECURITIES CORPORA-  
TION, NEW YORK TRUST COMPANY,  
FEDERAL NATIONAL MORTGAGE AS-  
SOCIATION, GRANT COUNTY, WASH-  
INGTON, a municipal corporation, UN-  
KNOWN OWNERS, Defendants.

COMPLAINT

1. This is an action of a civil nature brought by the United States of America for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of



Congress approved February 26, 1931 (46 Stat. 1421; 40 U.S.C. 258a) and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357; 40 U.S.C. 257); Sections 2663 and 9773 of Title 10, United States Code, which authorize the acquisition of property for military purposes, and the Act of Congress approved August 7, 1956 (Public Law 1020—84th Congress, 2d Session), as amended by the Act of Congress approved July 12, 1957 (Public Law 85-104), which authorized acquisition and made funds available for such purposes.

3. The uses for which the property is to be taken are to provide facilities for the use of the Department of the Air Force and for other military uses incident thereto. [1]\*

4. The interests in the property to be acquired are as follows:

(a) All right, title, and interest of Moses Lake Homes, Inc., a Washington corporation, arising out of lease dated May 31, 1950, bearing Contract No. AF-45(025)-39, between the Secretary of the Air Force, representing the United States of America, and Moses Lake Homes, Inc., recorded June 14, 1950, in Book 11 of Leases, Page 767, under Auditor's File No. 158267, records of Grant County, Washington; as modified by modification of lease agreement dated July 17, 1952, between said parties,

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\* Page numbers appearing at bottom of page of Original Transcript of Record.

recorded September 8, 1952, in Book 13 of Leases, Page 379, under Auditor's File No. 190862; and as amended on November 19, 1953, by Supplemental Agreement No. 1 to Contract No. AF-45(025)-39 which reserved to the Government and others a water pipe line easement over that portion of the land designated as Parcel No. 7 as is located within the boundaries of Parcel No. 1, said Parcel No. 1 being one of the parcels of land included in said lease as modified and amended; together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Parcels Nos. 1 and 2 and being the property of said corporation; subject, however, to a certain mortgage dated June 1, 1950, executed by Moses Lake Homes, Inc., a Washington corporation, to The National Bank of Commerce of Seattle, a corporation organized and existing under the laws of the United States, recorded June 14, 1950, in the Office of the County Auditor of Grant County, Washington, under Auditor's File No. 158268, and also filed as a chattel mortgage on June 14, 1950, in said Auditor's office under Auditor's File No. 158269; and also subject to existing easements for public roads and highways, public utilities, railroads and pipe lines.

(1) All right, title, and interest of Moses Lake Homes, Inc., a Washington corporation, arising out of a certain unnumbered easement agreement dated May 31, 1950, between the United States of America and Moses Lake Homes, Inc., for a right of way for a water pipe line, together with all tenements, hereditaments, appurtenances, apparatus,

fixtures, and equipment located on Parcel No. 3 described in Exhibit A attached hereto and made a part hereof.

(2) All right, title, and interest of Moses Lake Homes, Inc., a Washington corporation, arising out of a certain unnumbered easement [2] agreement dated May 31, 1950, between the United States of America and Moses Lake Homes, Inc., for a right of way for a sewer line, together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Parcel No. 4 described in Exhibit A attached hereto.

(3) All right, title, and interest of Moses Lake Homes, Inc., a Washington corporation, arising out of a certain contract for sewage and water services dated May 31, 1950, bearing Contract No. AF-45 (025)S-13 between the United States of America and Moses Lake Homes, Inc., together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Government property under the terms of said contract.

(b) All right, title, and interest of Larsonaire Homes, Inc., a Washington corporation, arising out of lease dated August 6, 1953, bearing Contract No. AF 45(617)-131, between the Secretary of the Air Force, representing the United States of America, and Larsonaire Homes, Inc.; together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Parcels 5 and 6 and being the property of said corporation; subject to a certain mortgage dated November 18, 1953,

executed by Larsonaire Homes, Inc., a Washington corporation, to Securities Mortgage, Inc., a Washington corporation, recorded November 27, 1953, in the Office of the County Auditor of Grant County, Washington, in Volume 72 of Mortgages at Page 502 under Auditor's File No. 213022, and also filed as a chattel mortgage on November 27, 1953, in said Auditor's office under Auditor's File No. 213023; and also subject to existing easements for public roads and highways, public utilities, railroads, and pipe lines.

(1) All right, title and interest of Larsonaire Homes, Inc., a Washington corporation, arising out of a certain contract for water and sewage services dated August 6, 1953, bearing Contract No. AF 45(617)s-132, between the United States of America and Larsonaire Homes, Inc., together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Government property under the terms of said contract.

(c) All right, title, and interest of Larsonaire Homes, Inc., a Washington corporation, and Moses Lake Homes, Inc., a Washington corporation, arising out of a certain easement agreement for a water line dated November 19, 1953, [3] bearing Contract No. AF 45(617)-133, between the United States of America and Larsonaire Homes, Inc., a Washington corporation, together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Parcel No. 7 described in

Exhibit A attached hereto; subject to the mortgage referred to in Paragraph 3 (b) hereof.

(1) All right, title, and interest of Larsonaire Homes, Inc., a Washington corporation, arising out of amendment to lease agreement dated November 19, 1953, bearing Contract No. AF 45(025)-39, Supplemental Agreement No. 1 between the Secretary of the Air Force, representing the United States of America, and Moses Lake Homes, Inc., and accepted by Larsonaire Homes, Inc., together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on that portion of Parcel No. 7 described in Exhibit A attached hereto as is located within the boundaries of Parcel No. 1 as described in Exhibit A attached hereto; subject to the mortgage referred to in Paragraph 3 (b) hereof.

(d) All right, title, and interest of Larson Heights, Inc., a Washington corporation, arising out of lease dated August 2, 1954, bearing Contract No. AF 45(617)s-57, between the Secretary of the Air Force, representing the United States of America, and Larson Heights, Inc., together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Parcels Nos. 8 and 9 and being the property of said corporation; subject, however, to a certain mortgage dated September 20, 1954, executed by Larson Heights, Inc., a Washington corporation, to Securities Mortgage, Inc., a Washington corporation, recorded September 23, 1954, in the Office of the County Auditor of

Grant County, Washington, under Auditor's File No. 230239, and also filed as a chattel mortgage on September 23, 1954, in the Office of the County Auditor of Grant County, Washington, under Auditor's File No. 230241, as modified and corrected as appears of record in the Auditor's Office of Grant County, Washington; and also subject to existing easements for public roads and highways, public utilities, railroads, and pipe lines.

(1) All right, title, and interest of Larson Heights, Inc., a Washington corporation, arising out of a certain contract for water and sewage services dated August 1, 1954, bearing Contract No. AF 45(617)s-58, [4] between the United States of America and Larson Heights, Inc., together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Government property under the terms of said contract.

5. The property so to be taken is described in Exhibit A attached hereto and made a part hereof.

6. The persons having or claiming an interest in the property whose names are ascertainable by a reasonably diligent search of the records and those whose names have otherwise been learned are:

Parcels 1, 2, 3, and 4:

Moses Lake Homes, Inc., a Washington corporation; The National Bank of Commerce of Seattle, a corporation; Institutional Securities Corporation; Grant County, Washington, a municipal corporation.



**Parcels 5 and 6:**

Larsonaire Homes, Inc., a Washington corporation; Securities Mortgage, Inc., a Washington corporation; The New York Trust Company; Federal National Mortgage Association; Grant County, Washington, a municipal corporation.

**Parcel 7:**

Moses Lake Homes, Inc., a Washington corporation; Larsonaire Homes, Inc., a Washington corporation; Institutional Securities Corporation; Securities Mortgage, Inc., a Washington corporation; The New York Trust Company; Federal National Mortgage Association; Grant County, Washington, a municipal corporation.

**Parcels 8 and 9:**

Larsen Heights, Inc., a Washington corporation; Securities Mortgage, Inc., a Washington corporation; Federal National Mortgage Association; Grant County, Washington, a municipal corporation.

7. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to the plaintiff and such persons are made parties to the action under the designation "Unknown Owners". [5]

Wherefore, the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and

for such other relief as may be lawful and proper.

/s/ WILLIAM B. BANTZ,

United States Attorney,

/s/ WALTER R. RODGERS, III,

Assistant U. S. Attorney,

Attorneys for Plaintiff.

Trial by jury of the issue of just compensation is demanded by plaintiff.

/s/ WILLIAM B. BANTZ,

United States Attorney,

/s/ WALTER R. RODGERS, III,

Assistant U. S. Attorney. [6]

### EXHIBIT "A"

#### Parcel 1

Contract AF-45(025)-39

A portion of Larson Air Force Base, formerly known as Moses Lake Air Force Base, lying in Sections thirty-two (32) and thirty-three (33), Township twenty (20) north, Range twenty-eight (28) east, Willamette Meridian, and Sections four (4) and five (5), Township nineteen (19) north, Range twenty-eight (28) east, Willamette Meridian and more particularly described as follows:

Beginning at a point on the south line of section thirty-two (32), Township twenty (20) north, Range twenty-eight (28) east, Willamette Meridian, which is twelve hundred and sixty-one and forty-eight hundredths (1261.48) feet from the southeast corner of said section thirty-two (32), which is the true



## Exhibit "A"—(Continued)

point of beginning; thence continuing along said section line south  $89^{\circ} 39' 40''$  west a distance of two hundred and fifteen and ninety-eight hundredths (215.98) feet; thence south  $40^{\circ} 02' 04''$  west a distance of eight hundred and eleven and forty-one hundredths (811.41) feet; thence north  $49^{\circ} 57' 56''$  west a distance of four hundred and twenty-seven and fifty-five hundredths (427.55) feet; thence north  $18^{\circ} 03' 41''$  west a distance of two hundred and thirty-five and sixty-four hundredths (235.64) feet; thence north  $0^{\circ} 00' 53''$  east a distance of ten hundred and fifty-six and seventy-six hundredths (1056.76) feet; thence north  $62^{\circ} 27' 53''$  east a distance of thirteen hundred and seven and eighty-eight hundredths (1307.88) feet; thence north  $89^{\circ} 58' 43''$  east a distance of ten hundred and forty and no hundredths (1040.00) feet; thence south  $0^{\circ} 01' 17''$  east a distance of five hundred and ninety-two and forty hundredths (592.40) feet; thence south  $29^{\circ} 29' 57''$  east a distance of twelve hundred and seventy and eighty-eight hundredths (1270.88) feet; thence south  $60^{\circ} 30' 03''$  west a distance of thirteen hundred and ninety and no hundredths (1390.00) feet; thence north  $29^{\circ} 29' 57''$  west a distance of nine hundred and seventy and fifty-one hundredths (970.51) feet to the true point of beginning; all bearings being referred to the true meridian, and the parcel of land containing a calculated area of one hundred and thirty-eight and seventy-three hundredths (138.73) acres more or less, located in Grant County, State of Washington.

## Exhibit "A"—(Continued)

## Parcel 2

Contract AF-45(025)-39

That certain parcel of land within the Larson Air Force Base, County of Grant and State of Washington, being a strip of land sixty (60) feet wide and lying thirty (30) feet on each side of the following described center line:

Starting at a point on the northeasterly margin of the Ephrata-Moses Lake Highway which will be the true point of beginning in the following described line: Beginning at a point on the south line of Section thirty-two (32), Township twenty (20) north, Range twenty-eight (28) east, Willamette Meridian, which is south  $89^{\circ} 39' 40''$  West a distance of twenty-four hundred and sixty-four and eight hundredths (2464.08) feet from the Southeast corner of the said Section thirty-two (32) and which is the intersection of the said section line with the Northeasterly margin of the said highway; thence, along the said Northeasterly margin, South  $18^{\circ} 03' 41''$  East a distance of six hundred and ninety-one and four hundredths (691.04) feet to the intersection with the center line of the entrance road (now called Lakeview Avenue) and which is the true point of beginning of this description; thence along the said center line of the said Lakeview Avenue, North  $40^{\circ} 02' 04''$  East a distance of 192.90 feet to an intersection with the southwesterly boundary of the leasehold at a point which is North  $49^{\circ} 57' 56''$  West a distance of 165.00 feet from the southwest corner of the said leasehold. [7]

## Exhibit "A"—(Continued)

## Parcel 3

## (Easement, Water Pipe Line)

That certain parcel of land within Larson Air Force Base, formerly known as Moses Lake Air Force Base, County of Grant and State of Washington, being a strip of land 10 feet wide and lying 5 feet on each side of the following described line:

Beginning at a point on the North boundary of the said leasehold which is South  $89^{\circ} 58' 43''$  West a distance of five hundred seventy-five and no hundredths (575.00) feet from the northeast corner of the said leasehold; thence North  $45^{\circ} 58' 54''$  West a distance of 202.16 feet; thence North  $22^{\circ} 59' 27''$  West a distance of 73.65 feet; thence North  $0^{\circ} 01' 11''$  West a distance of 77.77 feet to the point of connection with the existing 10 inch water main.

## Parcel 4

## (Easement, Sewage)

That certain parcel of land within Larson Air Force Base, formerly known as Moses Lake Air Force Base, County of Grant and State of Washington, being a strip of land 10 feet wide and lying 5 feet on each side of the following described line:

Beginning at a point on the East boundary of the said leasehold which is South  $0^{\circ} 01' 17''$  East a distance of 115.22 feet from the Northeast corner of said leasehold, thence North  $68^{\circ} 58' 16''$  East, a distance of 392.53 feet; thence North  $68^{\circ} 46' 06''$  East a distance of 468.70 feet; thence North  $1^{\circ} 21'$

Exhibit "A"—(Continued)

36" East a distance of 1128.00 feet to the point of connection with an existing 10 inch sewer line.

Parcel 5

Contract AF 45(617)-131

All that certain tract or parcel of land situate within the Larson Air Force Base, County of Grant, State of Washington, being more particularly described as follows:

Commencing at the northeast corner of Section 5, Township 19 North, Range 28 East, Willamette Meridian and running thence South  $89^{\circ} 39' 40''$  West 1261.48 feet to the point of beginning of the parcel of land herein described; thence South  $89^{\circ} 39' 40''$  West 215.98 feet to a point; thence South  $40^{\circ} 02' 04''$  West 97.54 feet to a point; thence South  $29^{\circ} 29' 57''$  East 1122.10 feet to a point; thence South  $39^{\circ} 04' 30''$  West 263.42 feet to a point; thence North  $80^{\circ} 00' 00''$  West 935.00 feet to a point; thence South  $18^{\circ} 03' 41''$  East 1107.13 feet to a point; thence North  $71^{\circ} 56' 19''$  East 2485.58 feet to a point; thence North  $29^{\circ} 29' 57''$  West, 1160 feet to a point; thence South  $60^{\circ} 30' 03''$  West 970.00 feet to a point; thence North  $29^{\circ} 29' 57''$  West 970.51 feet to the point of beginning, containing 58.39 acres of land, more or less.

Parcel 6

Contract AF 45(617)-131

That certain parcel of land within the Larson Air Force Base, County of Grant, State of Washington, being a strip of land 60 feet wide and lying

## Exhibit "A"—(Continued)

30 feet on each side of the following described center line:

Commencing at the Northeast corner of Section 5, Township 19 North, Range 28 East, Willamette Meridian and running thence South  $89^{\circ} 39' 40''$  West 2464.08 feet to a point being the intersection of said section line and the northeasterly boundary of the Ephrata-Moses Lake Highway right of way: thence along the northeasterly boundary of said right of way South  $18^{\circ} 03' 41''$  East, one thousand six hundred and nineteen and forty-three hundredths (1619.43) feet to the center line and point of beginning of the right of way herein described; thence North  $80^{\circ} 48' 00''$  East 33.56 feet to a point in the westerly boundary of the hereinabove described leased area. [8]

## Parcel 7

## Contract AF 45(617)-133

That certain parcel of land within the Larson Air Force Base, County of Grant and State of Washington, being a strip of land 10 feet wide and lying 5 feet on each side of the following described center line:

Commencing at the northeast corner of Section 5, Township 19 North, Range 28 East, Willamette Meridian and running thence South  $89^{\circ} 39' 40''$  West 1421.80 feet to a point on the south boundary of the premises leased to Moses Lake Homes, Inc., said point being the center line and true point of

Exhibit "A"—(Continued)

beginning of the right of way herein described; thence North  $62^{\circ} 27' 53''$  East 162.00 feet to a point; thence North  $29^{\circ} 29' 57''$  West 1281.17 feet to a point on the northwesterly boundary of the premises leased to Moses Lake Homes, Inc., thence North  $29^{\circ} 29' 57''$  West 6.00 feet to a point; thence North  $62^{\circ} 27' 53''$  East 697.46 feet to a point; thence North  $01^{\circ} 04' 45''$  West 153.30 feet to a point. A portion of the parcel of land herein described is located within the boundaries of Parcel No. 1 first above described.

Parcel 8

Contract AF 45(617)s-57

All that certain tract or parcel of land situate within Larson Air Force Base, County of Grant, State of Washington, being more particularly described as follows:

Commencing at the Southeast corner of the Northeast quarter of Section 5, Township 19 North, Range 28 East, Willamette Meridian, and running thence North  $00^{\circ} 14' 10''$  East 46.03 feet to the point of beginning of the parcel of land herein described; thence South  $71^{\circ} 56' 19''$  West 1483.39 feet to a point; thence North  $18^{\circ} 03' 41''$  West 1000.00 feet to a point; thence North  $71^{\circ} 56' 19''$  East 2485.58 feet to a point; thence South  $18^{\circ} 03' 41''$  East 1000.00 feet to a point; thence South  $71^{\circ} 56' 19''$  West 1002.19 feet to the point of beginning, containing 57.061 acres of land, more or less.



## Exhibit "A"—(Continued)

## Parcel 9

Contract AF 45(617)s-57

All that certain parcel of land situate within Larson Air Force Base, County of Grant, State of Washington, being a strip of land sixty feet wide and lying 30 feet on each side of the following described center line:-

Commencing at the Southeast corner of the Northeast quarter of Section 5, Township 19 North, Range 28 East, Willamette Meridian, and running thence North  $00^{\circ} 14' 10''$  East 46.03 feet to a point; thence South  $71^{\circ} 56' 19''$  West 1483.39 feet to a point; thence North  $18^{\circ} 03' 41''$  West 200.00 feet to the center line and the point of beginning of the right of way herein described; thence South  $71^{\circ} 56' 19''$  West 33.16 feet to a point on the northeasterly boundary of the Ephrata-Moses Lake Highway right of way. [9]

[Endorsed]: Filed March 1, 1958.

[Title of District Court and Cause.]

## DECLARATION OF TAKING

To the Honorable, the United States District Court:

I, the undersigned, Malcolm A. MacIntyre, Under Secretary of the Air Force of the United States, do hereby make the following declaration by direction of the Secretary of the Air Force:

1. (a) The property hereinafter described is taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421; 40 U.S.C. 258a) and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357; 40 U.S.C. 257); Sections 2663 and 9773 of Title 10, United States Code, which authorize the acquisition of property for military purposes, and the Act of Congress approved August 7, 1956 (Public Law 1020—84th Congress, 2d Session), as amended by the Act of Congress approved July 12, 1957 (Public Law 85-104), which authorized acquisition and made funds available for such purposes.

(b) The public uses for which said property is taken are as follows: The property is necessary adequately to provide facilities for the use of the Department of the Air Force and for other military uses incident thereto. The property has been selected under the direction of the Secretary of the Air Force for acquisition by the United States for use in connection with Larson Air Force Base, Washington, and for such other uses as may be authorized by Congress or by Executive Order. [10]

2. A general description of the property being taken is set forth in Schedule "A," attached hereto and made a part hereof, and is a description of the same property described in the complaint in the above entitled cause.

3. The estates taken are as follows:

(a) All right, title and interest of Moses Lake



Homes, Inc., a Washington corporation, arising out of lease dated May 31, 1950, bearing Contract No. AF-45(025)-39, between the Secretary of the Air Force, representing the United States of America, and Moses Lake Homes, Inc., recorded June 14, 1950, in Book 11 of Leases, Page 767, under Auditor's File No. 158267, records of Grant County, Washington; as modified by modification of lease agreement dated July 17, 1952, between said parties, recorded September 8, 1952, in Book 13 of Leases, Page 379, under Auditor's File No. 190863; and as amended on November 19, 1953, by Supplemental Agreement No. 1 to Contract No. AF-45(025)-39 which reserved to the Government and others a water pipe line easement over that portion of the land hereinafter designated as Parcel No. 7 as is located within the boundaries of Parcel No. 1, said Parcel No. 1 being one of the parcels of land included in said lease as modified and amended; together with all tenements, hereditaments, appurtenances, apparatus, fixtures and equipment located on Parcels Nos. 1 and 2 and being the property of said corporation; subject, however, to a certain mortgage dated June 1, 1950, executed by Moses Lake Homes, Inc., a Washington corporation, to The National Bank of Commerce of Seattle, a corporation organized and existing under the laws of the United States, recorded June 14, 1950, in the Office of the County Auditor of Grant County, Washington, under Auditor's File No. 158268, and also filed as a chattel mortgage on June 14, 1950, in said Auditor's Office under Auditor's File No.

158269; and also subject to existing easements for public roads and highways, public utilities, railroads and pipe lines.

(1) All right, title and interest of Moses Lake Homes, Inc., a Washington Corporation, arising out of a certain unnumbered easement agreement dated May 31, 1950, between the United States of America and Moses Lake Homes, [11] Inc., for a right of way for a water pipe line, together with all tenements, hereditaments, appurtenances, apparatus, fixtures and equipment located on Parcel No. 3 described in Schedule "A" hereto.

(2) All right, title and interest of Moses Lake Homes, Inc., a Washington corporation, arising out of a certain unnumbered easement agreement dated May 31, 1950, between the United States of America and Moses Lake Homes, Inc., for a right of way for a sewer line, together with all tenements, hereditaments, appurtenances, apparatus, fixtures and equipment located on Parcel No. 4 described in Schedule "A" hereto.

(3) All right, title and interest of Moses Lake Homes, Inc., a Washington corporation, arising out of a certain contract for sewage and water services dated May 31, 1950, bearing Contract No. AF 45 (025)S-13, between the United States of America and Moses Lake Homes, Inc., together with all tenements, hereditaments, appurtenances, apparatus, fixtures and equipment located on Government property under the terms of said contract.

(b) All right, title and interest of Larsonaire Homes, Inc., a Washington corporation, arising out

of lease dated August 6, 1953, bearing Contract No. AF 45(617)-131, between the Secretary of the Air Force, representing the United States of America, and Larsonaire Homes, Inc.; together with all tenements, hereditaments, appurtenances, apparatus, fixtures and equipment located on Parcels 5 and 6 and being the property of said corporation; subject to a certain mortgage dated November 18, 1953, executed by Larsonaire Homes, Inc., a Washington corporation, to Securities Mortgage, Inc., a Washington corporation, recorded November 27, 1953, in the Office of the County Auditor of Grant County, Washington, in Volume 72 of Mortgages at Page 502 under Auditor's File No. 213022, and also filed as a chattel mortgage on November 27, 1953, in said Auditor's Office under Auditor's File No. 213023; and also subject to existing easements for public roads and highways, public utilities, railroads and pipe lines.

(1) All right, title and interest of Larsonaire Homes, Inc., a Washington corporation, arising out of a certain contract for water and [12] sewage services dated August 6, 1953, bearing Contract No. AF 45(617)s-132, between the United States of America and Larsonaire Homes, Inc., together with all tenements, hereditaments, appurtenances, apparatus, fixtures and equipment located on Government property under the terms of said contract.

(c) All right, title and interest of Larsonaire Homes, Inc., a Washington corporation, and Moses Lake Homes, Inc., a Washington corporation, arising out of a certain easement agreement for a water

line dated November 19, 1953, bearing Contract No. AF 45(617)-133, between the United States of America and Larsonaire Homes, Inc., a Washington corporation, together with all tenements, hereditaments, appurtenances, apparatus, fixtures and equipment located on Parcel No. 7 described in Schedule "A" hereto; subject to the mortgage referred to in Paragraph 3 (b) hereof.

(1). All right, title and interest of Larsonaire Homes, Inc., a Washington corporation, arising out of amendment to lease agreement dated November 19, 1953, bearing Contract No. AF 45(025)-39, Supplemental Agreement No. 1 between the Secretary of the Air Force, representing the United States of America, and Moses Lake Homes, Inc., and accepted by Larsonaire Homes, Inc., together with all tenements, hereditaments, appurtenances, apparatus, fixtures and equipment located on that portion of Parcel No. 7 described in Schedule "A" hereto as is located within the boundaries of Parcel No. 1 as described in Schedule "A" hereto; subject to the mortgage referred to in Paragraph 3 (b) hereof.

(d) All right, title and interest of Larson Heights, Inc., a Washington corporation, arising out of lease dated August 2, 1954, bearing Contract No. AF 45(617)s-57, between the Secretary of the Air Force, representing the United States of America, and Larson Heights, Inc., together with all tenements, hereditaments, appurtenances, apparatus, fixtures and equipment located on Parcels Nos. 8 and 9 and being the property of said corporation; subject, however, to a certain mortgage dated September 20,

1954, executed by Larson Heights, Inc., a Washington corporation, to Securities [13] Mortgage, Inc., a Washington corporation, recorded September 23, 1954, in the Office of the County Auditor of Grant County, Washington, under Auditor's File No. 230239, and also filed as a chattel mortgage on September 23, 1954, in the Office of the County Auditor of Grant County, Washington, under Auditor's File No. 230241, as modified and corrected as appears of record in the Auditor's Office of Grant County, Washington; and also subject to existing easements for public roads and highways, public utilities, railroads and pipe lines.

(1) All right, title and interest of Larson Heights, Inc., a Washington corporation, arising out of a certain contract for water and sewage services dated August 1, 1954, bearing Contract No. AF 45(617)s-58, between the United States of America and Larson Heights, Inc., together with all tenements, hereditaments, appurtenances, apparatus, fixtures and equipment located on Government property under the terms of said contract.

4. A plan of the property is attached hereto as Schedule "B" and made a part hereof.

5. The sum estimated by the undersigned as just compensation for the interests hereby taken in the land, with all buildings and improvements thereon and all appurtenances thereto, is set forth in Schedule "A" herein which sum the undersigned causes to be deposited herewith in the registry of the court for the use and benefit of the persons entitled thereto. The undersigned is of the opinion that the

ultimate award for said interests probably will be within any limits prescribed by law as the price to the paid therefor.

In Witness Whereof, the undersigned, the Under Secretary of the Air Force, hereunto subscribes his name by direction of the Secretary of the Air Force, this 14th day of February, A.D. 1958, in the City of Washington, District of Columbia.

/s/ MALCOLM A. MacINTYRE,  
Under Secretary of the Air  
Force. [14]

### SCHEDULE "A"

The property which is the subject matter of this declaration of taking is situate in Grant County, State of Washington. Description of the property taken, together with the names of the purported lessees and a statement of the sum estimated to be just compensation therefor, is as follows:

[Description of Property is the same as Exhibit "A" set out at pages 11-18 with the exception of the following]:

Parcel 4  
(Easement, Sewage)

.....  
Name of Purported Lessee: Moses Lake Homes, Inc.

Address of Purported Lessee: 1021 Westlake Avenue, North Seattle, Washington.

Estimated Compensation: \$122,400.00.



## Parcel 6

Contract AF 45(617)-131

\*\*\*\*\*

Name of Purported Lessee: Larsonaire Homes, Inc.

Address of Purported Lessee: 1021 Westlake Avenue, Seattle, Washington.

Estimated Compensation: \$61,200.00.

## Parcel 7

Contract AF 45(617)-133

\*\*\*\*\*

Names and Addresses of Purported Lessees:  
Moses Lake Homes, Inc., 1021 Westlake Avenue,  
North Seattle, Washington. Larsonaire Homes, Inc.,  
1021 Westlake Avenue, Seattle, Washington.

Estimated Compensation: \$8,200.00.

## Parcel 9

Contract AF 45(617)s-57

\*\*\*\*\*

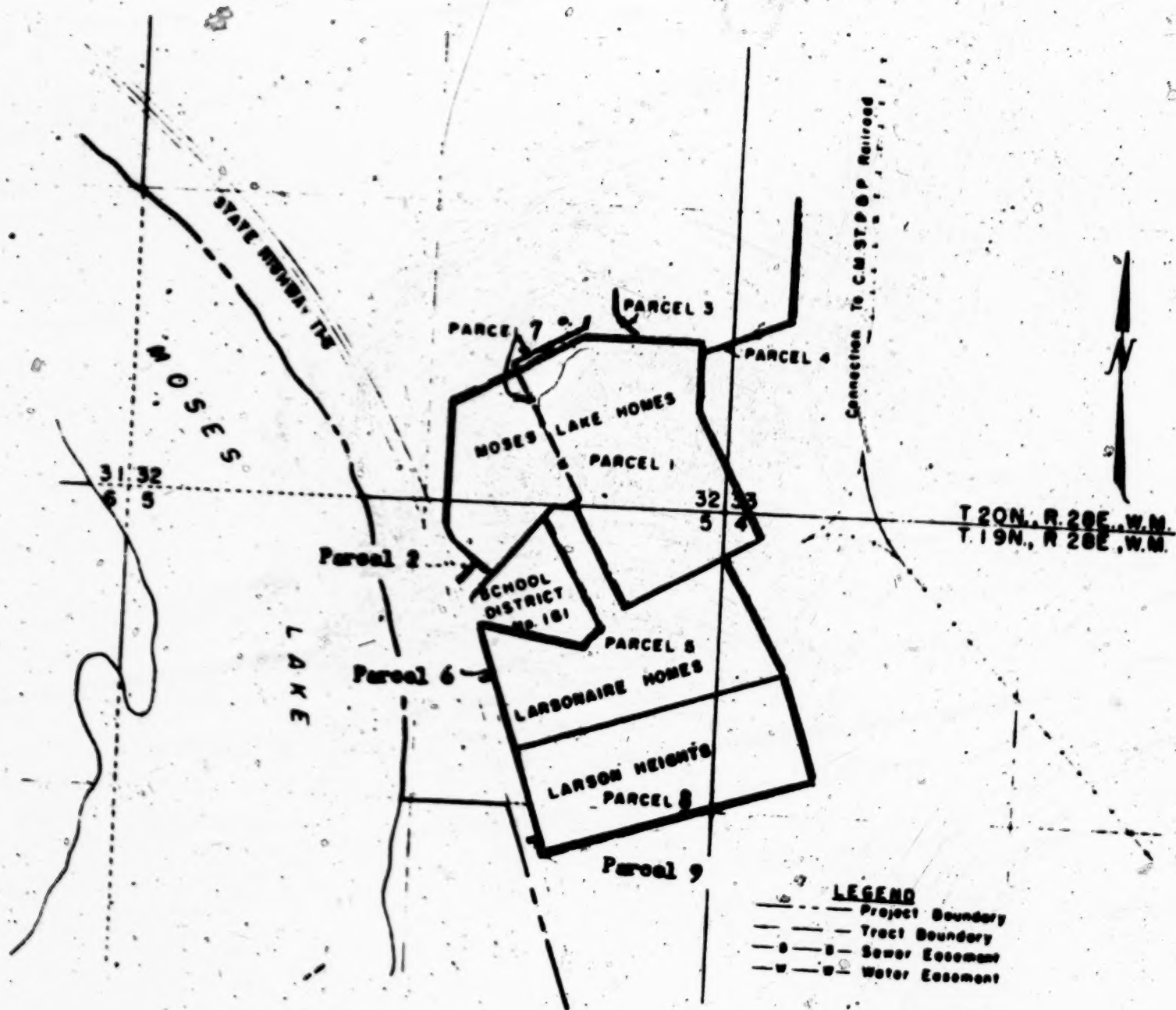
Name of Purported Lessee: Larson Heights, Inc.

Address of Purported Lessee: Seattle, Washington.

Estimated Compensation: \$61,200.00.

The gross sum estimated by the acquiring authority to be just compensation for the estates hereby taken, inclusive of all rights set forth in the declaration of taking, is \$253,000.00.

[Endorsed]: Filed March 1, 1958.



PORTION OF LARSON AIR FORCE BASE  
SCALE: 4" = 1 MILE

SCHEDULE "B"



Department of the Air Force  
Washington  
Office of the Secretary

• February 14, 1958

Dear Mr. Attorney General:

The Secretary of the Air Force has found and determined that it is necessary and advantageous to the interest of the United States that outstanding interests in land in Grant County, Washington, be acquired by the United States of America in connection with Wherry Housing at Larson Air Force Base, Washington.

Therefore, pursuant to the Acts of Congress set out in the inclosed declaration of taking, it is requested that a proceeding be instituted for the condemnation of these interests and that the declaration of taking be filed in conjunction with the condemnation proceeding. The estates to be acquired in the land, the descriptions thereof, and the names and addresses of the purported owners of the interests to be acquired are set forth in the declaration of taking. The sum estimated to be just compensation for the taking of the desired interests in the land is \$253,000.00 a check for which amount is inclosed for deposit into the registry of the court with the filing of the declaration of taking.

Funds for this acquisition have been made available by the Act of Congress approved 7 August 1956 (Public Law 1020—84th Congress, 2d Session), as amended by the Act of Congress approved 12 July 1957 (Public Law 85—104).

This acquisition has been approved by the Federal Housing Commissioner and efforts to acquire the property by negotiation have been unsuccessful. The owners of the interests in the property to be acquired have recommended that the acquisition be accomplished by condemnation.

It is requested that the proceeding be instituted, the declaration of taking be filed and an order be secured from the court granting to the United States possession of the property simultaneously on 1 March 1958.

It is requested that copies of the complaint and of the order of possession be furnished to the Assistant Chief of Engineers for Real Estate and to the District Engineer, US Army Engineer District, Walla Walla, Washington.

By Direction of the Secretary of the Air Force.

/s/ MALCOLM A. MacINTYRE,  
Under Secretary.

2 Inclosures—1. D/T (quad); 2. Check for \$253,000.00. Honorable William P. Rogers, Attorney General of the United States. [20]

[Endorsed]: Filed March 1, 1958.

[Title of District Court and Cause.]

**AFFIDAVIT OF G. F. McGUIRE**

State of Washington,  
County of Grant—ss.

I, G. F. McGuire, being first duly sworn, on oath say:

I am a Brigadier General in the United States Air Force, and am the Commander at Larson Air Force Base, Washington.

As Commander, I am in charge of the operation of the above named base, including the Wherry Housing Project located on said base.

I have been informed by William B. Bantz, United States Attorney for the Eastern District of Washington, that condemnation proceedings will be instituted by the United States of America through the United States Attorney for the Eastern District of Washington on March 1, 1958, for the acquisition of all right, title, and interest of Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., in Grant County, Washington to provide housing facilities in connection with Larson Air Force Base (Wherry Housing Project).

No personnel, either military or civilian, now living in housing located within the Wherry Housing Project above mentioned, will be dispossessed as of April 1, 1958 (date of possession), as a direct result of the above named condemnation action, and in the event civilian personnel now living [21] on the base

are required in the future to vacate, a minimum of sixty (60) days notice will be given them.

/s/ G. F. McGUIRE,

Brigadier General, U. S. Air Force, Commander,  
Larson Air Force Base.

Subscribed and sworn to before me this 27th day of February, 1958 at Larson Air Force Base, Washington.

/s/ R. W. ALBRECHT,

Major, U. S. Air Force. Staff Judge Advocate.

Authority: Act of 5 May 1950, C. 169, Section 1; 64 Stat. 143; 50 USC 732; Article 136, Uniform Code of Military Justice. [22]

[Endorsed]: Filed March 1, 1958.

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[Title of District Court and Cause.]

### NOTICE

To: The Above Defendants.

You are hereby notified that a complaint in condemnation has heretofore been filed in the office of the clerk of the above named court in an action to acquire for public uses for military purposes the following interests in and to Parcels Nos. 1 through 9, inclusive, described in Exhibit A attached hereto and made a part hereof:

(a) All right, title, and interest of Moses Lake Homes, Inc., a Washington corporation, arising out of lease dated May 31, 1950, bearing Contract No. AF-45(025)-39, between the Secretary of the Air

Force, representing the United States of America, and Moses Lake Homes, Inc., recorded June 14, 1950, in Book 11 of Leases, Page 767, under Auditor's File No. 158267, records of Grant County, Washington; as modified by modification of lease agreement dated July 17, 1952; between said parties, recorded September 8, 1952, in Book 13 of Leases, Page 379, under Auditor's File No. 190862; and as amended on November 19, 1953, by Supplemental Agreement No. 1 to Contract [23] No. AF-45 (025)-39 which reserved to the Government and others a water pipe line easement over that portion of the land designated as Parcel No. 7 as is located within the boundaries of Parcel No. 1, said Parcel No. 1 being one of the parcels of land included in said lease as modified and amended; together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Parcels Nos. 1 and 2 and being the property of said corporation; subject, however, to a certain mortgage dated June 1, 1950, executed by Moses Lake Homes, Inc., a Washington corporation, to The National Bank of Commerce of Seattle, a corporation organized and existing under the laws of the United States, recorded June 14, 1950, in the Office of the County Auditor of Grant County, Washington, under Auditor's File No. 158268, and also filed as a chattel mortgage on June 14, 1950, in said Auditor's Office under Auditor's file No. 158269; and also subject to existing easements for public roads and highways, public utilities, railroads, and pipe lines.

(1) All right, title, and interest of Moses Lake /

Homes, Inc., a Washington corporation, arising out of a certain unnumbered easement agreement dated May 31, 1950, between the United States of America and Moses Lake Homes, Inc., for a right of way for a water pipe line, together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Parcel No. 3.

(2) All right, title, and interest of Moses Lake Homes, Inc., a Washington corporation, arising out of a certain unnumbered easement agreement dated May 31, 1950, between the United States of America and Moses Lake Homes, Inc., for a right of way for a sewer line, together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Parcel No. 4.

(3) All right, title, and interest of Moses Lake Homes, Inc., a Washington corporation, arising out of a certain contract for sewage and water services dated May 31, 1950, bearing Contract No. AF 45 (025)S-13, between the United States of America and Moses Lake Homes, Inc., together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Government property under the terms of said contract. [24]

(b) All right, title, and interest of Larsonaire Homes, Inc., a Washington corporation, arising out of lease dated August 6, 1953, bearing Contract No. AF 45(617)-131, between the Secretary of the Air Force, representing the United States of America, and Larsonaire Homes, Inc.; together with all tenements, hereditaments, appurtenances, apparatus,



fixtures, and equipment located on Parcels 5 and 6 and being the property of said corporation; subject to a certain mortgage dated November 18, 1953, executed by Larsonaire Homes, Inc., a Washington corporation, to Securities Mortgage, Inc., a Washington corporation, recorded November 27, 1953, in the Office of the County Auditor of Grant County, Washington, in Volume 72 of Mortgages at Page 502 under Auditor's File No. 213022, and also filed as a chattel mortgage on November 27, 1953, in said Auditor's office under Auditor's File No. 213023; and also subject to existing easements for public roads and highways, public utilities, railroads, and pipe lines.

(1) All right, title, and interest of Larsonaire Homes, Inc., a Washington corporation, arising out of a certain contract for water and sewage services dated August 6, 1953, bearing Contract No. AF 45(617)s-132, between the United States of America and Larsonaire Homes, Inc., together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Government property under the terms of said contract.

(c) All right, title, and interest of Larsonaire Homes, Inc., a Washington corporation, and Moses Lake Homes, Inc., a Washington corporation, arising out of a certain easement agreement for a water line dated November 19, 1953, bearing Contract No. AF 45(617)-133, between the United States of America and Larsonaire Homes, Inc., a Washington corporation, together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and

objection or defense to the taking of your property you are required to serve upon plaintiff's attorney at the address herein designated within twenty days after personal service of this notice upon you, exclusive of the day of service, an answer identifying the property in which you claim to have an interest, stating the nature and extent of the interest claimed and stating all your objections and defenses to the taking of your property. A failure so to serve an answer shall constitute a consent to the taking and to the authority of the court to proceed to hear the action and to fix the just compensation and shall constitute a waiver of all defenses and objections not so presented.

You are further notified that if you have no objection or defense to the taking you may serve upon plaintiff's attorney a notice of appearance designating the property in which you claim to be interested, and thereafter you shall receive notice of all proceedings affecting the said property.

You are further notified that at the trial of the issue of just compensation, whether or not you have answered or served a notice of appearance, you may present evidence as to the amount of the compensation to be paid for the property in which you have any interest and you may share in the distribution of the award of compensation.

You are further notified that at the trial of the issue of just compensation the court will also make a determination as to the ownership of the property and as to those persons entitled to share in the award and in default of your appearance at such

trial the determination of the court will be binding upon you.

You are further notified that trial by jury of the issue of just compensation is demanded by plaintiff.

/s/ WILLIAM B. BANTZ,

United States Attorney,

/s/ WALTER R. RODGERS III,

Assistant U. S. Attorney,

Attorneys for Plaintiff. [27]

[Exhibit "A" is the same as Exhibit "A" attached to the Complaint. See page 11-18.]

**RETURN ON SERVICE OF WRIT**

United States of America,

Eastern District of Washington—ss.

I hereby certify and return that I served the annexed Notice on the therein-named Grant County, Washington, a municipal corporation, by handing to and leaving a true and correct copy thereof with Paul Klasen, the Co. Prosecutor, personally at County Court House at Ephrata, Washington, in the said District at 10:45 a.m., on the 3rd day of March, 1958.

DARRELL O. HOLMES,

United States Marshal,

/s/ By WESLEY C. ADAMS,

Deputy.

Marshal's fees \$2.00.

Mileage included on service of County Auditor. [31]

[Endorsed]: Filed March 5, 1958.

**RETURN ON SERVICE OF WRIT**

United States of America,  
Eastern District of Washington—ss.

I hereby certify and return that I served the annexed Notice on the therein-named Grant County, Washington, a municipal corporation, by handing to and leaving a true and correct copy thereof with J. F. Pedycord, Co. Auditor, personally at County Court House<sup>o</sup> at Ephrata, Washington, in the said District at 10:40 a.m., on the 3rd day of March, 1958.

**DARRELL O. HOLMES,**

United States Marshal,

/s/ By **WESLEY C. ADAMS,**  
Deputy.

Marshal's fees: \$2.00.

Mileage \$23.60. [32]

[Endorsed]: Filed March 5, 1958.

**RETURN ON SERVICE OF WRIT**

United States of America,  
Western District of Washington—ss.

I hereby certify and return that I served the annexed Notice on the therein-named National Bank of Commerce of Seattle by handing to and leaving a true and correct copy thereof with Mr. E. T. Stewart, Assistant Cashier, personally at 2nd at Spring Streets, at Seattle, Washington, in the

said District at 10:00 a.m., on the 7th day of March, 1958.

W. B. PARSONS,  
United States Marshal

/s/ By JAMES M. CLARK,  
Deputy

Marshal's fees \$2.00. Mileage: \$2.00.

I further certify and return that I served the said Notice upon each of the following named defendants by leaving for each of said defendants a true copy of said Notice at his or her dwelling house or usual place of abode with a person of suitable age and discretion then residing therein, as hereinafter set forth:

Defendant Moses Lake Homes, Inc.; date of service, March 4, 1958; place of service, 300 U. S. Courthouse, Seattle, Wash.; left with Clifford Mortinson, President.

Defendant Larsonaire Homes, Inc.; date of service, March 4, 1958; place of service, 300 U. S. Courthouse, Seattle, Wash.; left with Clifford Mortinson, President.

Defendant Larson Heights, Inc.; date of service, March 4, 1958; place of service, 300 U. S. Courthouse, Seattle, Wash.; left with Clifford Mortinson, President. \* \* \* \* \*

W. B. PARSONS,  
U. S. Marshal

/s/ By DONALD F. MILLER,  
Chief Deputy Marshal

Marshal's fee: \$6.00.

[Endorsed]: Filed March 14, 1958.

## RETURN ON SERVICE OF WRIT

United States of America,  
Southern District of New York—ss.

I hereby certify and return that I served the annexed Notice on the therein-named New York Trust Co. by handing to and leaving a true and correct copy thereof with E. O'Connor, Auditor, personally at 100 Broadway, at New York, New York, in the said District at 10:30 a.m., the 10th day of March, 1958.

THOMAS J. LUNNEY,

United States Marshal

/s/ By MICHAEL W. RADUE,

Deputy

Marshal's fees: \$2.00.

Mileage: \$.30.

## RETURN ON SERVICE OF WRIT

United States of America,  
Southern District of New York—ss.

I hereby certify and return that I served the annexed Notice on the therein-named Institutional Securities Corporation by handing to and leaving a true and correct copy thereof with Mr. L. A. de Castro, Vice-President and Treasurer, personally at 800 Second Avenue at New York, New



York, in the said District on the 10th day of March, 1958.

THOMAS J. LUNNEY,  
United States Marshal

/s/ By JAMES GUFFIN,  
Deputy

Marshal's fees: \$2.00.

Mileage: \$1.00. [36]

[Endorsed]: Filed March 17, 1958.

RETURN ON SERVICE OF WRIT

United States of America,

Western District of Washington—ss.

I hereby certify and return that I served the annexed Notice on the therein-named Securities Mortgage, Inc., a Washington corporation, by handing to and leaving a true and correct copy thereof with Mr. W. R. Jennings, Vice President, in charge, personally at 1904 Third Avenue, at Seattle, Washington, in the said District at 3:00 p.m., on the 21st day of March, 1958.

W. B. PARSONS,  
United States Marshal

/s/ By PYRL J. FORCIER,  
Deputy

Marshal's fees: \$2.00.

Mileage: \$.20. [37]

[Endorsed]: Filed March 26, 1958.

## RETURN ON SERVICE OF WRIT

United States of America,  
Southern District of California—ss.

I hereby certify and return that I served the annexed Notice on the therein-named Federal National Mortgage Association by handing to and leaving a true and correct copy thereof with Paul Akin, Manager, who is authorized to accept same, personally at 3540 Wilshire Blvd., at Los Angeles, Calif., in the said District at 2:20 p.m., on the 20th day of March, 1958.

/s/ ROBERT W. WARE,  
United States Marshal

/s/ By RAY M. FLEMING,  
Deputy

Marshal's fees: \$2.00.

Mileage: 12 miles, \$1.20. [38]

[Endorsed]: Filed March 28, 1958.

[Endorsed]: Notice Filed March 5, 1958.

[Title of District Court and Cause.]

## NOTICE OF APPEARANCE

To: The above named plaintiff and to William B. Bantz, United States Attorney:

Moses Lake Homes, Inc., a Washington corporation, Larsonaire Homes, Inc., a Washington corporation, and Larson Heights, Inc., a Washington corporation, defendants above named, hereby enter their appearance by the undersigned attorneys.

Said defendants claim an interest in each of the items taken in which they are respectively named in the notice as owners or holders.

LYCETTE, DIAMOND &  
SYLVESTER,

/s/ By LYLE L. IVERSEN,

Attorneys for Defendants Moses Lake Homes, Inc., Larsonaire Homes, Inc. and Larson Heights, Inc. [41]

[Endorsed]: Filed March 6, 1958.

[Title of District Court and Cause.]

LIS PENDENS

Notice Is Hereby Given that an action has been commenced and is now pending in the above entitled court by the United States of America as plaintiff against the above named defendants; that the objects and purposes of said action are as follows:

1. To acquire by condemnation as provided by law the following interests in and to Parcels Nos. 1 through 9, inclusive, described in Exhibit A attached hereto and made a part hereof.

(a) All right, title, and interest of Moses Lake Homes, Inc., a Washington corporation, arising out of lease dated May 31, 1950, bearing Contract No. AF-45(025)-39, between the Secretary of the Air Force, representing the United States of America, and Moses Lake Homes, Inc., recorded June 14,

1950, in Book 11 of Leases, Page 767, under Auditor's File No. 158267, records of Grant County, Washington; as modified by modification of lease agreement dated July 17, 1952, between said parties, recorded September 8, 1952, in Book 13 of Leases, Page 379, under Auditor's File No. 190862; and as amended on November 19, 1953, by Supplemental Agreement No. 1 to Contract No. AF-45 (025)-39 which reserved to the [42] Government and others a water pipe line easement over that portion of the land designated as Parcel No. 7 as is located within the boundaries of Parcel No. 1, said Parcel No. 1 being one of the parcels of land included in said lease as modified and amended; together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Parcels Nos. 1 and 2 and being the property of said corporation; subject, however, to a certain mortgage dated June 1, 1950, executed by Moses Lake Homes, Inc., a Washington corporation, to The National Bank of Commerce of Seattle, a corporation organized and existing under the laws of the United States, recorded June 14, 1950, in the Office of the County Auditor of Grant County, Washington, under Auditor's File No. 158268, and also filed as a chattel mortgage on June 14, 1950, in said Auditor's Office under Auditor's File No. 158269; and also subject to existing easements for public roads and highways, public utilities, railroads, and pipe lines.

(1) All right, title, and interest of Moses Lake Homes, Inc., a Washington corporation, arising out

of a certain unnumbered easement agreement dated May 31, 1950, between the United States of America and Moses Lake Homes, Inc., for a right of way for a water pipe line, together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Parcel No. 3.

(2) All right, title, and interest of Moses Lake Homes, Inc., a Washington corporation, arising out of a certain unnumbered easement agreement dated May 31, 1950, between the United States of America and Moses Lake Homes, Inc., for a right of way for a sewer line, together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Parcel 4.

(3) All right, title, and interest of Moses Lake Homes, Inc., a Washington corporation, arising out of a certain contract for sewage and water services dated May 31, 1950, bearing Contract No. AF 45 (025)S-13, between the United States of America and Moses Lake Homes, Inc., together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Government property under the terms of said contract.

(b) All right, title, and interest of Larsonaire Homes, Inc., a Washington corporation, arising out of lease dated August 6, 1953, bearing Contract No. AF 45(617)-131, between the Secretary of the Air Force, representing the United States of America, and Larsonaire Homes, Inc.; together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Parcels 5 and 6 and being the property of said cor-

poration; subject to a certain mortgage dated November 18, 1953, executed by Larsonaire Homes, Inc., a Washington corporation, Securities Mortgage, Inc., a Washington corporation, recorded November 27, 1953, in the Office of the County Auditor of Grant County, Washington, in Volume 72 of Mortgages at Page 502 under Auditor's File No. 213022, and also filed as a chattel mortgage on November 27, 1953, in said Auditor's Office under Auditor's File No. 213023; and also subject to existing easements for public roads and highways, public utilities, railroads, and pipe lines.

(1) All right, title, and interest of Larsonaire Homes, Inc., a Washington corporation, arising out of a certain contract for water and sewage services dated August 6, 1953, bearing Contract No. AF 45(617)s-132, between the United States of America and Larsonaire Homes, Inc., together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Government property under the terms of said contract.

(c) All right, title, and interest of Larsonaire Homes, Inc., a Washington corporation, and Moses Lake Homes, Inc., a Washington corporation, arising out of a certain easement agreement for a water line dated November 19, 1953, bearing Contract No. AF 45(617)-133, between the United States of America and Larsonaire Homes, Inc., a Washington corporation, together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Parcel No. 7;



subject to the mortgage referred to in Paragraph 3 (b) hereof.

(1) All right, title, and interest of Larsonaire Homes, Inc., a Washington corporation, arising out of amendment to lease agreement dated November 19, 1953, bearing Contract No. AF 45(025)-39, Supplemental Agreement No. 1 between the Secretary of the Air Force, representing the United States of America, and Moses Lake Homes, Inc., and accepted by Larsonaire Homes, Inc., together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on that portion of Parcel No. 7 described in Exhibit A attached hereto as is located within the boundaries of Parcel No. 1; subject to the mortgage referred to in Paragraph 3 (b) hereof. [44]

(d) All right, title, and interest of Larson Heights, Inc., a Washington corporation, arising out of lease dated August 2, 1954, bearing Contract No. AF 45(617)s-57, between the Secretary of the Air Force, representing the United States of America, and Larson Heights, Inc., together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Parcels Nos. 8 and 9 and being the property of said corporation; subject, however, to a certain mortgage dated September 20, 1954, executed by Larson Heights, Inc., a Washington corporation, to Securities Mortgage Inc., a Washington corporation, recorded September 23, 1954, in the Office of the County Auditor of Grant County, Washington, un-

der Auditor's File No. 230239, and also filed as a chattel mortgage on September 23, 1954, in the office of the County Auditor of Grant County, Washington, under Auditor's File No. 230241, as modified and corrected as appears of record in the Auditor's Office of Grant County, Washington; and also subject to existing easements for public roads and highways, public utilities, railroads, and pipe lines.

(1) All right, title, and interest of Larson Heights, Inc., a Washington corporation, arising out of a certain contract for water and sewage services dated August 1, 1954, bearing Contract No. AF 45(617)s-58, between the United States of America and Larson Heights, Inc., together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on Government property under the terms of said contract.

2. To determine a just and proper award and compensation for said property, to determine the parties entitled to receive such compensation, and to decree the property to be the property of the United States; and for such other relief as to the court may seem proper in the premises.

Dated: March 3, 1958.

/s/ WILLIAM B. BANTZ,  
United States Attorney

/s/ WALTER R. RODGERS III,  
Asst. United States Attorney,  
Attorneys for Plaintiff. [45]

[Exhibit "A" is the same as Exhibit "A" attached to the Complaint. See pages 11-18.]

Filed or Recorded Vol. 5, Page 523..J. F. Peddy-cord, Auditor, Grant County, Washington.

[Endorsed]: Filed March 7, 1958.

[Title of District Court and Cause.]

**MOTION FOR TEMPORARY RESTRAIN-  
ING ORDER**

Comes now the United States of America by and through its attorney William B. Bantz, United States Attorney for the Eastern District of Washington, and moves the above entitled court for the reasons set forth in the affidavit attached hereto, for a temporary restraining order restraining Grant County, State of Washington, its officers and agents, servants, employees and attorneys, from proceeding to have a Treasurer's Tax Lien Foreclosure Sale on or as to any of the real or personal property of the Wherry Housing Project on Larson Air Force Base, Grant County, State of Washington, or as to any leasehold interest that Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., all Washington corporations, may have claimed prior to March 1, 1958 as to such property.

A copy of the declaration of taking is attached to the affidavit of William B. Bantz, said affidavit being attached hereto and made a part of this Motion.

/s/ WILLIAM B. BANTZ,  
United States Attorney. [49]

[Title of District Court and Cause.]

**AFFIDAVIT IN SUPPORT OF MOTION FOR  
TEMPORARY RESTRAINING ORDER**

State of Washington

County of Spokane—ss.

William B. Bantz, being first duly sworn, on oath deposes and says:

1. I am the duly appointed United States Attorney for the Eastern District of Washington.

2. That the United States of America is the title owner of the real property on which Larson Air Force Base, Grant County, State of Washington, is located.

3. That the United States of America is the title owner of the real property on which the Wherry Housing Project at Larson Air Force Base, Grant County, State of Washington, is located.

4. That on March 1, 1958, the Office of the United States Attorney filed with the clerk of this court a declaration of taking covering all of the leasehold interests of the sponsors of the Wherry Housing Project at Larson Air Force Base along with depositing into the registry of this court estimated just compensation in the amount of \$253,000.00. Said authority and the full declaration of taking setting out the estates taken under the declaration of taking are attached hereto and made a part of this affidavit.

5. That by the filing of said declaration of tak-

ing the United States is the owner not only of the real property, buildings, and improvements of the Wherry Housing Project but all leasehold interest of Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., all Washington corporations, [50] that were the sponsors and lessees of this Wherry Housing Project located at Larson Air Force Base.

6. Grant County, State of Washington, was a party defendant to said complaint filed March 1, 1958, making it a party defendant for whatever interest it may claim in this property, real, personal, or leasehold interest.

7. The Assessor of Grant County, State of Washington, had, prior to March 1, 1958, assessed certain personal property taxes against the personal property on the Wherry Housing Project at Larson Air Force Base.

8. The County Treasurer, Grant County, State of Washington, received said assessment and attempted to collect said taxes in accordance with the laws of the State of Washington.

9. Certain of said assessed taxes have apparently not been paid by the corporations owning the leasehold interest on the Wherry Housing Project at Larson Air Force Base.

10. Said County Treasurer has filed his tax lien and has proceeded to bring his lien to judgment and has to the best of my knowledge and belief, set March 18, 1958 as the date of final judgment and sale of the property of Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc.

to satisfy said tax lien judgment against the personal property on the Wherry Housing Project at Larson Air Force Base.

11. The Grant County Prosecuting Attorney on March 10, 1958, advised me that the said sale mentioned in the above paragraph is to be held on the 18th day of March, 1958 even though he has been advised by me and has been properly served with notice by the United States Marshal that the United States of America is the title owner to said real and personal property and all leasehold interest of anyone whatsoever concerning the Wherry Housing Project at Larson Air Force Base. He further stated to me that the County Treasurer plans to have a Treasurer's sale of the property regardless of the fact that the United States is now the owner of the property by virtue of the declaration of taking filed on March 1, 1958.

12. It is further the affiant's position that Grant County, State of Washington, has no right to attempt to sell any of the property described in the [51] declaration of taking or to attach any property on the Wherry Housing Project located at Larson Air Force Base, Grant County, State of Washington, for the following reasons:

(a) The United States of America is the title owner of the real and personal property and all of the leasehold rights and interests that Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc. may have in this property.

(b) That Grant County, State of Washington, is a party defendant in the complaint and that it



has a speedy and adequate remedy at law in this court to determine if it has or had any interest of any kind in the estate taken by the United States of America by virtue of the filing of the declaration of taking on March 1, 1958.

(c) That Grant County through its own courts nor Grant County Treasurer through his own action, has no right to encumber or dissipate the property of the United States of America.

(d) That the United States of America will be irreparably harmed if the Grant County Treasurer or his authorized representative have said tax sale and sell any of the properties or interests to any purchaser, and thereby deliver any title, interest, or right to any of the property in which title is now vested in the United States of America, and by said sale it is possible that some individual could attempt to actually and physically take the property and if this was accomplished the United States could be irreparably harmed.

(e) That Grant County by having said sale is attempting to encumber the property of the United States without having proper jurisdiction to so do.

13. That this motion for a temporary restraining order should be granted to protect the property of the United States only until such time as this court can have a hearing between Grant County and the sponsor corporations, Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc. as to the right and interest that Grant County may have in the \$253,000.00 now on deposit with the clerk of this court, and it is further the position of the

United States Attorney [52] that as to this argument the United States should take no position except that he should protect the property of the United States from any sale or encumbrances, which is the purpose of this motion as the action of the Grant County Treasurer is an attempt to satisfy a tax lien assessed prior to the date of the taking by the United States when it filed its declaration of taking on March 1, 1958, and by attempting to satisfy said lien is now encumbering the property of the United States without jurisdiction to do so.

14. It is further the position of the United States Attorney that this motion is not extraordinary in any way and should be granted as to Grant County, State of Washington, as said County is a party defendant in this action and was personally served with notice by the United States Marshal on March 3, 1958, and said County has personal knowledge of the ownership of the United States of America of all said properties and interests set out in the complaint and declaration of taking under Civil Action No. 1667 of this court.

15. It is further the position of the United States Attorney that Grant County does not need to take this extraordinary procedure or steps to protect its interest as to any tax liens that they may have concerning said property or interest taken by the United States of America as a result of said declaration of taking as the United States of America deposited more money into the registry of this court than is being asked for by the Grant County Treasurer in the foreclosure of its tax lien sale.

16. It is the position of the United States Attorney, by making Grant County a party defendant and depositing said ~~just~~ compensation into the registry of this court, that said Grant County is now under the sole jurisdiction of this court insofar as all of the properties, real and personal, and leasehold interest of Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc. are concerned insofar as the Wherry Housing Project located at Larson Air Force Base, and that Grant County has an adequate and speedy remedy at law in this court.

17. This court has jurisdiction of this motion for a temporary restraining order under Rule 65, (b), (c), and (d).

18. It is further pointed out that in the opinion of the United States Attorney that the motion and order will not be in violation of Title 28, Section [53] 1341 or Section 2283 as under Section 1341 there can be no adequate plain, speedy or efficient remedy at law in the state courts as the state courts have no jurisdiction over the property Grant County is now attempting to sell for the satisfaction of a state tax lien as the title to the property is in the name of the United States of America and this court is the only court with jurisdiction over the United States of America (Title 28, Section 1345).

Under Section 2283 this court should issue this order to protect or effectuate its judgment of the declaration of taking of March 1, 1958, and further

it is necessary in aid of its jurisdiction over the property of the United States.

19. It is the understanding and belief of the United States Attorney that this temporary restraining order should be granted ex parte only when just cause for this action can be shown (Rule 65). It is, however, in the opinion of the United States Attorney that the United States of America could suffer irreparable injury, loss or damage if this Treasurer's sale is allowed to take place as the office of the United States Attorney could not serve the proper notices on Grant County, State of Washington giving it sufficient time to come in and be present at the time the United States presents this order for signature by this court as it is my understanding that Judge Sam M. Driver is to be out of the district in the next day or so and will not be available for a hearing prior to the 18th day of March, 1958.

20. It is not the desire of the United States Attorney to restrain Grant County in any way from having a determination of its rights as to its tax lien, and the affiant in no way wants to defer it from having its day in court, but affiant feels that until such time as this court can have a hearing that said County should be restrained from selling or attempting to sell any or all real or personal property or any leasehold interest on the Wherry Housing Project at Larson Air Force Base covering any interest that Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc. may have had prior to March 1, 1958, and that said

County should be restrained until further order of this court.

/s/ WILLIAM B. BANTZ.

Subscribed and Sworn to before me this 11th day of March, 1958.

[Seal] /s/ WALTER R. RODGERS III,  
Notary Public in and for the State of Washington,  
residing at Spokane. [54]

[Declaration of Taking is set out at pages 18-25.]

[Endorsed]: Filed March 11, 1958.

[Title of District Court and Cause.]

### ORDER

(Temporary Restraining Order)

Having read the motion and affidavit of United States Attorney William B. Bantz, it is hereby

Ordered, Adjudged and Decreed that Grant County, its officers and agents, servants, employees and attorneys, are hereby restrained from selling or attempting to sell or dispose in any way any or all real or personal property, or any leasehold interests on the Wherry Housing Project at Larson Air Force Base, Grant County, State of Washington, which includes any interest in said property that Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., all Washington corporations, may have had in said property prior to March 1, 1958 until further order of this court.

This order is issued for the following reasons:

1. The United States of America is and has been

the title owner to the real property of Larson Air Force Base, including the Wherry Housing Project area.

2. The United States on March 1, 1958 filed a declaration of taking (a copy being attached to the motion for this order) with the sum of \$253,000.00 being deposited with the clerk of the above entitled court as just compensation for the interests taken from the above named corporations.

3. That since March 1, 1958 no one other than the United States has any interest in said real or personal property or any leasehold [60] interest on Larson Air Force Base and more specifically the Wherry Housing Project area.

4. That this court is the only court with original jurisdiction as to any suit against the United States and over the property of the United States.

5. The United States Attorney set out in his affidavit that the Prosecuting Attorney for Grant County has advised him that a tax lien sale will be held on the 18th day of March, 1958 covering the above described property.

6. That the property of the United States is in jeopardy of being sold or removed unless Grant County, its officers or agents, are restrained from having Treasury Tax Lien Sale for delinquent taxes covering some interest they claim as to the Wherry Housing Project and namely the three corporations listed above.

It Is Further Ordered by this Court that:

(a) A hearing in reference to this temporary restraining order is set for the 21st day of March,



1958 at 1:30 P.M. in the courtroom of the above entitled Court in Spokane, Washington.

(b) A copy of this order shall be served upon the following Grant County officers or agents at Ephrata, State of Washington:

1. County Auditor.
2. County Treasurer.
3. Prosecuting Attorney.

Dated this 12th day of March, 1958.

/s/ SAM M. DRIVER,

United States District Judge.

Presented by:

/s/ WILLIAM B. BANTZ,

United States Attorney.

Issued March 12th, 1958 at 9 o'clock A.M.

/s/ SAM M. DRIVER,

U. S. District Judge. [61]

[Endorsed]: Filed March 12, 1958.

[Title of District Court and Cause.]

### UNITED STATES MARSHAL'S RETURN

United States of America

Eastern District of Washington--ss.

I hereby certify and return that as directed in the order entered herein on March 12, 1958, I did on the 12th day of March, 1958, serve copies of the Temporary Restraining Order, together with copies of Motion for Temporary Restraining Order, Affidavit in Support of Motion for Temporary Re-

straining Order and Declaration of Taking herein, upon each of the following officers of Grant County, State of Washington, personally at the places and at the times hereinafter set forth, to-wit:

Officer—Name—Time—Place served:

County Auditor—John F. Peddycord—7:25 p.m.  
—Elks Club, Moses Lake, Washington.

County Treasurer—Robert S. O'Brien—8:05 p.m.  
—112 Mocliff Road, Ephrata, Washington.

Prosecuting Attorney—Paul A. Klasen—8:14 p.m.  
143 Crest Drive, Ephrata, Washington.

Dated this 17th day of March, 1958.

DARRELL O. HOLMES,

United States Marshal,

/s/ By GEORGE A. LOCKE,  
Deputy.

Marshal's fees: \$6.00

Mileage: 25.90

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Total 31.90 [62]

[Endorsed]: Filed March 17, 1958.

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[Title of District Court and Cause.]

### NOTICE OF APPEARANCE

To the Above Named Plaintiff and to William B. Bantz, United States Attorney:

Grant County, Washington, a municipal corporation, one of the defendants above-named, hereby enters its appearance by the under-signed attorney.

Said defendant claims an interest in each of the items taken.

Dated this 17th day of March, 1958.

/s/ PAUL KLASSEN,  
Grant County Attorney. [63]

[Endorsed]: Filed March 19, 1958.

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[Title of District Court and Cause.]

**MOTION TO EXTEND TIME FOR HEARING  
ON RESTRAINING ORDER**

Comes now the United States of America by and through its attorneys William B. Bantz, United States Attorney for the Eastern District of Washington, and Walter R. Rodgers, III, Assistant United States Attorney for the Eastern District of Washington, and moves the above entitled Court to extend for ten days the hearing in reference to the Order (Temporary Restraining Order) issued March 12, 1958 at 9:00 o'clock a.m. by Sam M. Driver, United States District Judge and filed in the United States District Court for the Eastern District of Washington, March 12, 1958, which hearing was set for the 21st day of March, 1958 at 1:30 p.m. in the courtroom of the above entitled Court at Spokane, Washington; and moves that the hearing be set for the 31st day of March, 1958, at 10:00 a.m. in the courtroom of the above entitled Court at Spokane, Washington, for the reason that the above entitled Court will be in session at Yakima,

Washington at the time and date originally set for the hearing in the above mentioned Order.

/s/ WILLIAM B. BANTZ,  
United States Attorney,

/s/ WALTER R. RODGERS III,  
Assistant U. S. Attorney,  
Attorneys for Plaintiff. [64]

[Endorsed]: Filed March 21, 1958.

[Title of District Court and Cause.]

### ORDER EXTENDING TIME FOR HEARING ON RESTRAINING ORDER

—Having read the motion of the attorneys for the United States of America, it is hereby

Ordered, Adjudged and Decreed that the hearing set for 1:30 p.m., March 21, 1958 in the courtroom of the above entitled Court at Spokane, Washington in reference to an Order issued March 12, 1958 at 9:00 o'clock a.m. by Sam M. Driver, United States District Judge, Civil Action No. 1667, is hereby extended for ten days; and is set for 10:00 a.m., March 31, 1958 in the courtroom of the above entitled Court at Spokane, Washington.

It is Further Ordered by this Court that a copy of this order shall be served upon the following Grant County officers or agents at Ephrata, Washington:

\* \* \* \* \*

3. Prosecuting Attorney by Mail.

Dated March 21st, 1958.

/s/ SAM M. DRIVER,

United States District Judge.

Presented by:

/s/ WALTER R. RODGERS III,

Assistant U. S. Attorney. [65]

Entered at 10:00 a.m. March 21, 1958. S.M.D.

[Endorsed]: Filed March 21, 1958.

[Title of District Court and Cause.]

**PETITION OF MOSES LAKE HOMES, INC.  
FOR ORDER DIRECTING PAYMENT OF  
MONEY**

Moses Lake Homes, Inc. petitions as follows:

1. Moses Lake Homes, Inc. is one of the defendants named in the complaint in the within action, and at all times material hereto, was a corporation organized under the laws of the State of Washington, and had paid all license fees due to the State of Washington.

2. At the time of the filing of the declaration of taking herein, on the 1st day of March, 1958, this defendant was lessee under Contract No. AF-45 (025)-39, between the Secretary of the Air Force, representing the United States of America, and Moses Lake Homes, Inc., and was the owner of all rights derived therefrom in the properties referred to in Schedule A of the declaration of taking, as parcels 1, 2, 3, and 4, with respect to which the

plaintiff has deposited in the registry of the court the sum of \$122,400 as estimated compensation. This petitioner is also one-half owner of the interest derived under [66] Contract No. AF-45(617)-133 in a certain easement described as parcel 7 in Annex A to the declaration of taking, with respect to which plaintiff has paid into the registry of the court the sum of \$8,200 as estimated compensation, and this petitioner's proportion thereof is \$4,100.

3. At the time of the filing of the declaration of taking, the mortgage on this defendant's leasehold on said parcels was and is now in good standing and the mortgagee has no claim upon the funds deposited into court.

4. At the time of the filing of the declaration of taking, Grant County had no valid lien upon this petitioner's leasehold, having never assessed, levied upon or distrained petitioner's leasehold or any interests derived therefrom or any of the property being taken by the Government under this proceeding, and under the laws of the State of Washington, defendant Grant County acquired no lien or other interest in the property subject to this action, and is entitled to no part of the compensation for the taking of the property which is the subject of this action.

5. This petitioner is solely entitled to receive the compensation for the property taken herein.

6. The amount of the estimated compensation now deposited in the registry of the court is substantially less than the value of the property taken, and this petitioner makes this application without



prejudice to its right to seek additional compensation in this proceeding.

Wherefore, Moses Lake Homes, Inc. petitions for an order directing the Clerk to pay to it the amount of estimated compensation deposited in the registry of the court with respect to parcels 1, 2, 3 and 4 in the sum of \$122,400, and one-half of the amount of the estimated compensation deposited in the registry of the court with respect to parcel 7, in the amount of \$4,100.

LYCETTE, DIAMOND  
& SYLVESTER,

/s/ By LYLE L. IVERSEN,

Attorneys for Defendant Moses Lake  
Homes, Inc. [67]

Duly Verified. [68]

[Endorsed]: Filed March 26, 1958.

[Title of District Court and Cause.].

**PETITION OF LARSONAIRE HOMES, INC.  
FOR ORDER DIRECTING PAYMENT OF  
MONEY**

Larsonaire Homes, Inc. petitions as follows:

1. Larsonaire Homes, Inc. is one of the defendants named in the complaint in the within action, and at all times material hereto was a corporation organized under the laws of the State of Washington, and has paid all license fees due to the State of Washington.

2. At the time of the filing of the declaration of taking herein, on the 1st day of March, 1958, this defendant was lessee under Contract No. AF-45 (617)-131, between the Secretary of the Air Force, representing the United States of America, and Larsonaire Homes, Inc., and was the owner of all rights derived therefrom in the properties referred to in Schedule A of the declaration of taking, as parcels 5 and 6, with respect to which the plaintiff has deposited in the registry of the court the sum of \$61,200 as estimated compensation. This petitioner is also one-half owner of the interest derived under Contract No. AF-45(617)-133 [69] in a certain easement described as parcel 7 in Annex A to the declaration of taking, with respect to which plaintiff has paid into the registry of the court the sum of \$8,200 as estimated compensation, and this petitioner's proportion thereof is \$4,100.

3. At the time of the filing of the declaration of taking, the mortgage on this defendant's leasehold on said parcels was and is now in good standing and the mortgagee has no claim upon the funds deposited into court.

4. At the time of the filing of the declaration of taking, Grant County had no valid lien upon this petitioner's leasehold; having never assessed, levied upon or distrained petitioner's leasehold or any interests derived therefrom or any of the property being taken by the Government under this proceeding, and under the laws of the State of Washington, defendant Grant County acquired no lien

or other interest in the property subject to this action, and is entitled to no part of the compensation for the taking of the property which is the subject of this action.

5. This petitioner is solely entitled to receive the compensation for the property taken herein.

6. The amount of the estimated compensation now deposited in the registry of the court is substantially less than the value of the property taken, and this petitioner makes this application without prejudice to its right to seek additional compensation in this proceeding.

Wherefore, Larsonaire Homes, Inc. petitions for an order directing the Clerk to pay to it the amount of estimated compensation deposited in the registry of the court with respect to parcels 5 and 6 in the sum of \$61,200, and one-half of the amount of the estimated compensation deposited in the registry of the court with respect to parcel 7, in the amount of \$4,100.

LYCETTE, DIAMOND  
& SYLVESTER,

/s/ By LYLE L. IVERSEN,

Attorneys for Defendant Larsonaire  
Homes, Inc. [70]

Duly Verified. [71]

[Endorsed]: Filed March 26, 1958.

[Title of District Court and Cause.]

**PETITION OF LARSON HEIGHTS, INC.  
FOR ORDER DIRECTING PAYMENT OF  
MONEY**

Larson Heights, Inc., petitions as follows:

1. Larson Heights, Inc. is one of the defendants named in the complaint in the within action, and at all times material hereto was a corporation organized under the laws of the State of Washington, and has paid all license fees due to the State of Washington.

2. At the time of the filing of the declaration of taking herein, on the 1st day of March, 1958, this defendant was lessee under Contract No. AF-45 (617)-S-57, between the Secretary of the Air Force, representing the United States of America, and Larson Heights, Inc., and was the owner of all rights derived therefrom in the properties referred to in Schedule A of the declaration of taking as parcels 8 and 9, with respect to which the plaintiff has deposited in the registry of the court the sum of \$61,200 as estimated compensation. [72]

3. At the time of the filing of the declaration of taking, the mortgage on this defendant's leasehold on said parcels was and is now in good standing and the mortgagee has no claim upon the funds deposited into court.

4. At the time of the filing of the declaration of taking, Grant County had no valid lien upon this

petitioner's leasehold, having never assessed, levied upon or distrained petitioner's leasehold or any interests derived therefrom or any of the property being taken by the Government under this proceeding, and under the laws of the State of Washington, defendant Grant County acquired no lien or other interest in the property subject to this action, and is entitled to no part of the compensation for the taking of the property which is the subject of this action.

5. This petitioner is solely entitled to receive the compensation for the property taken herein.

6. The amount of the estimated compensation now deposited in the registry of the court is substantially less than the value of the property taken, and this petitioner makes this application without prejudice to its right to seek additional compensation in this proceeding.

Wherefore, Larson Heights, Inc. petitions for an order directing the Clerk to pay to it the amount of estimated compensation deposited in the registry of the court with respect to parcels 8 and 9 in the sum of \$61,200.

LYCETTE, DIAMOND  
& SYLVESTER,

/s/ By LYLE L. IVERSEN,

Attorneys for Defendant Larson  
Heights, Inc. [73]

Duly Verified. [74]

[Endorsed]: Filed March 26, 1958.

[Title of District Court and Cause.]

**PERSONAL PROPERTY TAX AND ASSESSMENT LIEN STATEMENT**

It is respectfully represented to the court as follows:

**I.**

The power and authority to levy taxes and assessments on real and personal property is, and at all times herein mentioned has been, held by the undersigned.

**II.**

On the date of the filing of the declaration of taking herein, which was on March 1, 1958, liens for accrued taxes and assessments were held by the undersigned against the personal property and improvements located on the real property described in Exhibit A attached hereto and made a part hereof as Parcels 1 through 9, inclusive.

**III.**

By virtue of the filing of the declaration of taking in this proceeding certain interests in and to the premises described in Exhibit A attached hereto vested in the United States of America, thereby impairing said liens as follows:

| Name of Party          | Tax year | Principal   | Interest to<br>March 1, 1958 |
|------------------------|----------|-------------|------------------------------|
| Moses Lake Homes, Inc. | 1955     | \$21,150.00 | \$ 4,798.72                  |
|                        | 1956     | 32,925.00   | 4,836.35                     |
|                        | 1957     | 31,330.00   | 2,095.66                     |
|                        | 1958     | 23,575.00   |                              |
|                        | 1959     | 23,575.00   |                              |



| Name of Party          | Tax year | Principal                 | Interest to<br>March 1, 1958 |
|------------------------|----------|---------------------------|------------------------------|
| Larsonaire Homes, Inc. | 1956     | 21,750.00                 |                              |
|                        | 1957     | 18,798.00                 |                              |
|                        | 1958     | 14,145.00(1) <sup>1</sup> |                              |
|                        | 1959     | 14,145.00                 |                              |
| Larson Heights, Inc.   | 1957     | 18,798.00                 |                              |
|                        | 1958     | 14,145.00(2) <sup>1</sup> |                              |
|                        | 1959     | 14,145.00                 |                              |

## IV.

That the Grant County Treasurer took possession before March 1, 1958, by provision of Distraint Statutes of the State of Washington in accordance with R.C.W. 84.56.080 and R.C.W. 84.56.090 as filed as against Moses Lake Homes, Inc., Grant County Auditor's File No. 309660; as against Larson Heights, Inc., Grant County Auditor's File No. 309659; as against Larsonaire Homes, Inc., Grant County Auditor's File No. 309661.

## V.

No right, title or interest in said personal property located on said real property is claimed by the undersigned except as above stated.

Wherefore, it is prayed that any award made for the property in this action be applied to the payment of the liens above set forth.

GRANT COUNTY, WASHINGTON,

A Municipal Corporation,

/s/ By ROBERT S. O'BRIEN,

County Treasurer.

/s/ PAUL KLASSEN,

Prosecuting Attorney.

<sup>1</sup>Anticipated taxes; assessment temporarily enjoined by Grant County Superior Court Cases No. 10682 and No. 10683.

State of Washington  
County of Grant—ss.

The undersigned, being first duly sworn, on oath says: That he is the duly elected, qualified, and acting Treasurer of the above named defendant county and Treasurer ex-officio of any other municipal corporation above named; that he is authorized to execute the foregoing personal property tax and assessment lien statement; that he has read the same and believes the same to be true.

/s/ ROBERT S. O'BRIEN.

Subscribed and Sworn to before me this 19th day of March, 1958.

[Seal] /s/ PAUL A. KLASSEN, JR.,  
Notary Public in and for the State of Washington,  
residing at Ephrata. [76]

[Exhibit "A" is the same as Exhibit "A" attached to the Complaint. See pages 11-18.]

[Endorsed]: Filed March 28, 1958.

[Title of District Court and Cause.]

**DISCLAIMER OF THE NATIONAL BANK  
OF COMMERCE OF SEATTLE AS TO  
PARCELS 1, 2, 3, AND 4**

The undersigned defendant, appearing generally in the above entitled cause, consenting to the jurisdiction of the above named court, and waiving service of process and notice of hearing with respect to Parcels 1, 2, 3, and 4, does hereby expressly waive

and disclaim any and all right, title or interest in or to the compensation to be paid for the taking of an estate in the lands described in Exhibit A attached hereto and made a part hereof, and does further waive and disclaim any claim for damages arising out of said taking.

Dated March 27, 1958.

THE NATIONAL BANK OF COM-  
MERCE OF SEATTLE, a Corpo-  
ration,

/s/ By M. J. SANTI

As Its Vice President. [80]

Duly Verified.

[Descriptions of Parcels 1, 2, 3 and 4 are the same as in Exhibit "A" attached to the Complaint. See pages 11-15.]

[Endorsed]: Filed March 28, 1958.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the United States by its attorney, William B. Bantz, United States Attorney for the Eastern District of Washington and Grant County, Washington, a municipal corporation, by its attorney, Paul A. Klasen, Jr. that the hearing set for 10:00 a.m., March 31, 1958 in the courtroom of the above entitled court at Spokane, Washington shall be vacated; and that the temporary restraining order issued March 12,

1958 at 9:00 a.m., which order was extended by the court on March 21, 1958 at 10:00 a.m., shall be superseded by a preliminary injunction pending the determination by the court of the petitions for order directing payment of money by the attorneys for Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc.

Dated March 27th, 1958.

UNITED STATES OF AMERICA,  
Plaintiff,

/s/ By WILLIAM B. BANTZ,  
United States Attorney.

GRANT COUNTY, WASHINGTON,  
A Municipal Corporation,

/s/ By PAUL A. KLASSEN, JR.,  
As Its Attorney,  
Stipulating Defendant. [83]

[Endorsed]: Filed March 28, 1958.

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[Title of District Court and Cause.]

### ORDER GRANTING PRELIMINARY INJUNCTION

This cause coming on to be heard upon the stipulation of the United States Attorney, William B. Bantz and the Prosecuting Attorney of Grant County, Washington, Paul A. Klassen, Jr. for a preliminary injunction, the court makes the following findings of fact and conclusions of law.

**Findings of Fact**

1. That on March 1, 1958, the office of the United States Attorney for the Eastern District of Washington filed with the clerk of this court a declaration of taking covering all of the leasehold interests of the sponsors of the Wherry Housing Project at Larson Air Force Base, Moses Lake, Washington, along with depositing into the registry of this court estimated just compensation in the amount of \$253,000.00.

2. That Grant County, Washington was a party defendant to the complaint filed March 1, 1958 with the aforesaid declaration of taking making it a party defendant for whatever interest it may claim in this property, real, personal, or leasehold interest.

3. The assessor of Grant County had, prior to March 1, 1958, assessed certain personal property taxes against the personal property on the Wherry Housing Project at Larson Air Force Base.

4. The treasurer of Grant County, Washington received said assessment [84] and attempted to collect said taxes in accordance with the laws of the State of Washington.

5. The said Grant County Treasurer had filed his tax lien and had proceeded to bring his lien to judgment and had set March 18, 1958 as the date of final judgment and sale of the property of Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc. to satisfy said tax lien judg-

ment against the personal property on the Wherry Housing Project at Larson Air Force Base.

6. That on March 12, 1958, this court ordered, adjudged, and decreed that Grant County, its officers and agents, servants, employees, and attorneys be restrained from selling or attempting to sell or dispose in any way any or all real or personal property, or any leasehold interests on the Wherry Housing Project at Larson Air Force Base, Grant County, State of Washington, including any interest in said property that Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc. may have had in said property prior to March 1, 1958. The said restraining order further ordered that a hearing be set for March 21, 1958 at 1:30 p.m. in the courtroom of this court at Spokane, Washington.

7. On March 21, 1958, the United States through its attorneys moved this court to extend for ten days the hearing order by the aforementioned temporary restraining order.

8. This court ordered, adjudged, and decreed that the hearing be extended for ten days and set for 10:00 a.m. March 31, 1958 in the courtroom of this court at Spokane, Washington.

9. The attorneys for Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., have filed petitions with the clerk of this court for orders directing the clerk to pay to the aforesaid corporations the amount of estimated compensation deposited into the registry of the court.



From the foregoing Findings of Fact the court makes the following:

*Conclusions of Law*

1. That by the filing of said declaration of taking by the United States on March 1, 1958, the United States is the owner not only of the real property, buildings, and improvements of the Wherry Housing Project at Larson Air Force Base, but all leasehold interest of Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., all Washington corporations, that were the sponsors and lessees of this Wherry Housing Project located at Larson Air Force Base.

2. That this court is the only court with original jurisdiction as to any suit against the United States and over the property of the United States.

3. The property of the United States is in jeopardy of being sold or removed unless Grant County, its officers and agents, are restrained from having said tax lien sale for delinquent taxes covering some interest they claim as to the Wherry Housing Project and namely the three corporations listed above.

Wherefore, it is ordered that a preliminary injunction be and it hereby is granted the United States against the defendant, Grant County, Washington, its officers and agents, servants, employees, and attorneys restraining them from selling or attempting to sell or dispose in any way any or all real or personal property, or any leasehold inter-

ests on the Wherry Housing Project at Larson Air Force Base, Grant County, Washington, which includes any interest in said property that Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., all Washington corporations, may have had in said property prior to March 1, 1958, until such time as a determination is made by this court of the petitions filed by the attorneys for Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc. for orders directing the payment of money.

Dated: March 28, 1958.

/s/ SAM M. DRIVER,

United States District Judge.

Approved as to form and substance and notice of presentment waived:

/s/ PAUL A. KLASSEN, JR.,

Attorney for Defendant, Grant County, Washington, a municipal corporation.

Presented by:

/s/ WILLIAM B. BANTZ,

United States Attorney. [86]

[Endorsed]: Filed March 28, 1958.

[Title of District Court and Cause.]

**NOTICE OF APPEARANCE**

Dated: April 1, 1958

The Federal National Mortgage Association, one of the defendants herein, files this its Notice of Appearance herein and respectfully represents that:

**I.**

The Federal National Mortgage Association is a corporate instrumentality of the United States Government, organized and existing pursuant to Title III of the National Housing Act, as amended.

**II.**

The Federal National Mortgage Association is the owner and holder of a mortgage note and mortgage dated November 18, 1953, filed for record November 27, 1953 under Auditor's File No. 213022 in Book 72, page 502 to secure the sum of One Million Seven Hundred Eighty-Two Thousand and no/100 Dollars (\$1,782,000.00) and interest. Said mortgage was executed by Larsonaire Homes, Inc., to Securities Mortgage Company and assigned by it to Federal National Mortgage Association by an assignment dated February 10, 1955; recorded as No. 238789 in Book 82, page 218, Grant County, Washington. The mortgage hereinabove described was also filed [87] as a chattel mortgage on November 27, 1953 as Auditor's File No. 213023, Vault No. 70588 and recorded in Chattel Mortgages on

December 21, 1953 as Auditor's File No. 214197 and assigned to Federal National Mortgage Association by instrument dated February 10, 1955, filed February 14, 1955 as Auditor's File No. 238790.

### III.

The Federal National Mortgage Association is also the owner and holder of a mortgage note and mortgage dated September 20, 1954 executed by Larson Heights, Inc. to Securities Mortgage, Inc. filed September 23, 1954 as Auditor's File No. 230239 to secure the sum of One Million Six Hundred Twenty-Six Thousand Three Hundred and no/100 Dollars (\$' 626,300.00) and interest, said mortgage was modified and rerecorded on September 21, 1955 as Auditor's File No. 254814 and again modified and rerecorded on September 30, 1955 as Auditor's File No. 255407. On November 16, 1955 the parties to said mortgage executed a "Mortgage Correction and Modification Agreement," setting forth the modifications and corrections made in subject mortgage, said instrument recorded November 21, 1955 as Auditor's File No. 258842. Said mortgage was assigned to Federal National Mortgage Association by instrument dated December 9, 1955, filed December 14, 1955 as Auditor's File No. 260448, Records of Grant County, Washington.

An executed copy of the mortgage hereinabove was filed as a chattel mortgage on September 23, 1954 as Auditor's File No. 230240, Vault No. 76806 and also recorded as a chattel mortgage on said

date under Auditor's File No. 230241. On November 16, 1955 the parties to said chattel mortgage executed a "Mortgage Correction and Modification Agreement" setting forth the modifications and corrections made in subject chattel mortgage, said instrument being filed for record on November 21, 1955 as Auditor's File No. 258844 and filed with the original instrument in Vault No. 76806. Said instrument was also recorded as a chattel mortgage on said date under Auditor's File No. 258843.

The chattel mortgage was assigned to Federal National Mortgage Association by instrument dated December 9, 1955, filed December 14, 1955 as Auditor's File No. 260449, Vault No. 76806.

The payments of the above mortgages are secured by the real property [88] sought to be condemned herein.

**FEDERAL NATIONAL MORTGAGE  
ASSOCIATION,**

/s/ By PAUL AKIN,  
Agency Manager. [89].

[Endorsed]: Filed April 8, 1958.

[Title of District Court and Cause.]

**PETITION OF GRANT COUNTY, WASHINGTON  
FOR ORDER DIRECTING PAY-  
MENT OF MONEY**

Grant County, Washington, petitions as follows:

1. Grant County, Washington, a municipal cor-

poration, is one of the Defendants named in the Complaint in the within action.

2. Prior to the time of filing the Declaration of Taking herein, the Defendant, Grant County, by and through its duly elected, acting and qualified treasurer, Robert S. O'Brien, had distrained the property of the defendants, Moses Lake Homes, Inc., Larsonaire Homes, Inc. and Larson Heights, Inc. for the collection of the following taxes for the years 1955, 1956, and 1957:

|                             | Tax year | Tax         | Interest to<br>March 1, 1958 |
|-----------------------------|----------|-------------|------------------------------|
| Moses Lake Homes, Inc.      | 1955     | \$21,150.00 | \$ 4,798.72                  |
|                             | 1956     | 32,925.00   | 4,836.35                     |
|                             | 1957     | 31,330.00   | 2,095.66                     |
| Total Tax and Interest..... |          |             | \$97,135.73                  |
|                             | Year     | Tax         |                              |
| Larsonaire Homes, Inc.      | 1956     | \$21,750.00 |                              |
|                             | 1957     | 18,798.00   |                              |
|                             |          | \$85,405.00 | \$11,730.73                  |
| Total tax.....              |          | \$40,548.00 |                              |
|                             | Year     | Tax         |                              |
| Larson Heights, Inc.        | 1957     | \$18,798.00 |                              |

Total tax for which property was distrained  
\$156,481.73.

3. In addition the Defendant, Grant County, has a lien on the property of the Defendant Moses Lake Homes, Inc. as follows:

|            |             |
|------------|-------------|
| 1958 ..... | \$22,575.00 |
| 1959 ..... | 22,575.00   |
| Total..... | \$45,150.00 |



4. Defendants Larsonaire Homes, Inc. in Cause No. 10683 in the Superior Court, Grant County, Washington, obtained a Temporary Injunction against Grant County and its Assessor restraining the assessing of the property of Larsonaire Homes, Inc.—but for said Temporary Injunction, the taxes for the property of Larsonaire Homes, Inc. for the years of 1958 and 1959 would be as follows:

|             |             |
|-------------|-------------|
| 1958 .....  | \$14,145.00 |
| 1959 .....  | 14,145.00   |
| <hr/>       |             |
| Total ..... | \$28,290.00 |

5. Defendant Larson Heights, Inc., in Cause No. 10682 in the Superior Court, Grant County, Washington, obtained a Temporary Injunction against Grant County and its Assessor restraining the assessing of the property of Larson Heights, Inc.—but for said Temporary Injunction, the taxes for the property of Larson Heights, Inc. for the years 1958 and 1959, would be as follows:

|             |             |
|-------------|-------------|
| 1958 .....  | \$14,145.00 |
| 1959 .....  | 14,145.00   |
| <hr/>       |             |
| Total ..... | \$28,290.00 |

[91]

6. Grant County claims a lien for personal property taxes upon the property of the Defendants, Moses Lake Homes, Inc., Larsonaire Homes, Inc. and Larson Heights, Inc., as follows:

|                               | Tax year | Tax          | Interest to<br>March 1, 1958 |
|-------------------------------|----------|--------------|------------------------------|
| Moses Lake Homes, Inc.        | 1955     | \$21,150.00  | \$ 4,798.72                  |
|                               | 1956     | 32,925.00    | 4,836.35                     |
|                               | 1957     | 31,330.00    | 2,095.66                     |
|                               | 1958     | 22,575.00    |                              |
|                               | 1959     | 22,575.00    |                              |
| Larsonaire Homes, Inc.        | 1956     | 21,750.00    |                              |
|                               | 1957     | 18,798.00    |                              |
|                               | 1958     | 14,145.00    |                              |
|                               | 1959     | 14,145.00    |                              |
| Larson Heights, Inc.          | 1957     | 18,798.00    |                              |
|                               | 1958     | 14,145.00    |                              |
|                               | 1959     | 14,145.00    |                              |
| Total .....                   |          | \$246,481.00 | \$11,730.73                  |
| Total Taxes and Interest..... |          |              | \$258,211.73                 |

7. The defendant, Moses Lake Homes, Inc., Larsonaire Homes, Inc. and Larson Heights, Inc. continued to use, occupy said property until April 1, 1958.

8. The Lien of Grant County, Washington for the above personal property tax is superior to the rights, liens or claims of any of the other Defendants in this action; that said taxes are just, legal, due and proper.

9. The Plaintiff has deposited the sum of \$253,000.00 for the interest of the Defendants in the registry of the Court.

Wherefore, Grant County, Washington petitions for an Order directing the Clerk to pay to Grant County, Washington the [92] \$253,000.00 deposited

in the registry of the Court for partial satisfaction of its taxes.

**GRANT COUNTY, WASHINGTON**

/s/ By **PAUL KLASSEN,**

Grant County Prosecuting Attorney, Court House,  
Ephrata, Washington.

Duly Verified.

[93]

[Endorsed] Filed April 8, 1958.

[Title of District Court and Cause.]

**DISCLAIMER OF SECURITIES MORTGAGE,  
INC. AS TO PARCELS 5, 6, 7, 8 and 9**

The undersigned defendant, appearing generally in the above entitled cause, consenting to the jurisdiction of the above named court, and waiving service of process and notice of hearing with respect to Parcels 5, 6, 7, 8 and 9, does hereby expressly waive and disclaim any and all right, title or interest in or to the compensation to be paid for the taking of an estate in the lands described in Exhibit A attached hereto and made a part hereof, and does further waive and disclaim any claim for damages arising out of said taking.

Dated: April 17th, 1958:

**SECURITIES MORTGAGE, INC.,**  
a Washington corporation,

/s/ By **CHARLES F. CLISE,**

As Trustee for the Liquidation of Securities Mortgage, Inc.

Duly Verified. [94]

[Descriptions of Parcels 5, 6, 7, 8 and 9 are the same as in Exhibit "A" attached to the Complaint. See pages 15-18.]

[Endorsed]: Filed April 22, 1958.

[Title of District Court and Cause.]

### REQUESTS FOR ADMISSIONS

Grant County, Washington, a municipal corporation, one of the above-named defendants, requests defendants, Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., pursuant to Rule 36 of the Rules of Civil Procedure, to admit within ten (10) days after the service of this request upon its counsel, that the following facts are true:

1. That the stockholders of Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc. are substantially the same during the construction period.

2. That the construction of the property in question by Moses Lake Homes, Inc., Larsonaire Homes, Inc. and Larson Heights, Inc. was done by the same corporation.

3. That at the time of the construction of the three projects at Larson Air Force Base, the stockholders of the construction company were substantially the same as the stockholders in Moses Lake

Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc.

4. That the same standard of construction was used in the construction of the property in question.

5. That the life expectancy of the buildings of Moses Lake Homes, Inc. in question herein will not exceed sixty years.

6. That the life expectancy of the buildings of Larsonaire [97] Homes, Inc. in question herein will not exceed sixty years.

7. That the life expectancy of the buildings of Larson Heights, Inc. in question herein will not exceed sixty years.

8. That Moses Lake Homes, Inc. obtained an F.H.A. secured loan in the approximate sum of three million two hundred thirty-six thousand dollars (\$3,236,000.00) to construct its project at Larson Air Force Base.

9. That Larsonaire Homes, Inc. obtained an F.H.A. secured loan in the approximate sum of one million seven hundred eighty-two thousand dollars (\$1,782,000.00) to construct its project at Larson Air Force Base.

10. That Larson Heights, Inc. obtained an F.H.A. secured loan in the approximate sum of one million six hundred thousand dollars (\$1,600,000.00) to construct its project at Larson Air Force Base.

11. That the fire insurance policy or policies taken out by Moses Lake Homes, Inc. on the pre-

mises in question show the insured as Moses Lake Homes, Inc.

12. That the fire insurance policy or policies taken out by Larsonaire Homes, Inc. on the premises in question show the insured as Larsonaire Homes, Inc.

13. That the fire insurance policy or policies taken out by Larson Heights, Inc. on the premises in question show the insured as Larson Heights, Inc.

14. That there was at least two million five hundred thousand dollars (\$2,500,000.00) worth of fire insurance on the premises in question of Moses Lake Homes, Inc. and an proportional amount of fire insurance on the premises in question belonging to Larsonaire Homes, Inc. and Larson Heights, Inc.

15. That in May 1952, the Grant County Assessor assessed 1953 personal property taxes against Moses Lake Homes, Inc. That Moses Lake Homes, Inc. brought an action in Grant County [98] Superior Court, Cause No. 8095, to enjoin the 1953 taxes and taxes for all subsequent years; That both aspects of the injunction were denied and Moses Lake Homes appealed to the Supreme Court of the State of Washington, Cause No. 32442; That Moses Lake Homes withdrew its appeal in September 1953, before argument.

16. The Grant County Assessor assessed Moses Lake Homes, Inc. in 1954 for 1955 taxes with the



assessed valuation at five hundred thousand dollars (\$500,000.00); That Moses Lake Homes, Inc. obtained a Temporary Injunction against the County Assessor until the decision of the Supreme Court of the State of Washington in Moses Lake Homes, Inc. vs. Grant County, et al. 151 Wash. Dec. 254.

17. That Moses Lake Homes, Inc. commenced a third action against Grant County in the Superior Court of Grant County in February 1958 Cause No. 10925 in an attempt to restrain the levying and collecting of taxes from the Moses Lake Homes, Inc.

18. That on September 1957, Larsonaire Homes, Inc. and Larson Heights, Inc. commenced similar actions in the Superior Court of Grant County, respectively, Cause No. 10683 and 10682, wherein the plaintiffs obtained Temporary Injunctions against Grant County to prevent the levying or spreading upon the assessment rolls a tax upon the improvements erected by Larsonaire Homes, Inc. or Larson Heights, Inc.

19. That the three pending lawsuits in Grant County became moot as a result of this pending action.

20. That the Notice identified as Annex 3 in Moses Lake Homes, Inc., et al Request for Admissions was never communicated to either the Grant County Assessor or Board of County Commissioners by either the lessee's or by any representative of the United States Air Force.

21. That the aforementioned Annex 3 was not communicated to any official of Grant County before the 19th of September 1957. [99]

22. That there has been no Determination under Section 408 of the Housing Amendment of 1955, as amended, by the Department of the Air Force for the taxing year of 1956 for Larson Air Force Base.

23. That there has been no Determination under Section 408 of the Housing Amendment of 1955, as amended, by the Department of the Air Force for the taxing year of 1957 for Larson Air Force Base.

24. That there has been no Determination under Section 408 of the Housing Amendment of 1955, as amended, by the Department of the Air Force for the taxing year of 1958 for Larson Air Force Base.

25. That there has been no Determination under Section 408 of the Housing Amendment of 1955, as amended, by the Department of the Air Force for the taxing year of 1959, for Larson Air Force Base.

26. That Grant County, Washington does not customarily provide street, curbs and sidewalks, such as exist at the Wherry projects at Larson Air Force Base.

27. That Grant County, Washington does not customarily provide water and/or sewer systems and maintenance and repair for same.

28. That Grant County, Washington does not customarily provide playground maintenance.

29. That during the years 1954, 1955, 1956, 1957, and 1958 the Grant County Sheriff did provide the same police protection to the Wherry Hous-

ing Projects that the Grant County Sheriff customarily provides to the rest of Grant County.

30. That Grant County does not provide street lighting anywhere within Grant County.

31. That Grant County provides maintenance, repair or other services only to roads and streets that are dedicated to Grant County. [100]

32. That the roads and streets referred to in the aforementioned Annex 3 are not dedicated to Grant County, Washington.

33. That Moses Lake Homes, Inc., Larsonaire Homes, Inc. and Larson Heights, Inc. had actual physical control of their properties at Larson Air Force Base until after the 2nd of March 1958.

34. That the United States of America did not take over the actual physical possession of the Wherry Housing projects at Larson Air Force Base until about the 31st of March 1958.

35. That during the month of March 1958 Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc. collected the rents from and operated their project at Larson Air Force Base in the usual manner until the Government took over actual physical control and operation the 1st of April 1958 or thereabouts.

/s/ PAUL KLASSEN,

Attorney for the Defendant, Grant  
County, Washington.

Acknowledgment of Receipt of Copy attached.

[Endorsed]: Filed June 13, 1958.

[Title of District Court and Cause.]

**RESPONSE OF MOSES LAKE HOMES, INC.,  
LARSONAIRE HOMES, INC., AND LAR-  
SON HEIGHTS, INC., TO REQUESTS  
FOR ADMISSIONS**

These defendants decline to admit the matters contained in the requests for admissions submitted by Grant County with respect to the following requests for the reasons herein stated:

1. With respect to request No. 2, these defendants cannot admit that the construction of the property of each of the three corporations was done by the same corporation, but does admit that each corporation constructed the buildings upon the land leased to it.

2. With respect to requests No. 5, 6, and 7, these defendants cannot admit that the life expectancy of the buildings will not exceed sixty (60) years since the terms of the lease of each of these defendants provided for replacement reserves which would have resulted in maintenance of the buildings in perpetuity.

3. With respect to Requests No. 11, 12 and 13, these defendants cannot admit the requests for the reason that the fire insurance policies in each case were made out to the corporation and the mortgagee and the Federal Housing commissioner, his successors or assigns, as interests may appear. For example, the insurance taken out by Moses Lake Homes, Inc. carries with it the following rider:

"To Institutional Securities Corporation of New York and Federal Housing Commissioner, Federal Housing Administration, Washington, D.C., his successors and/or assigns, as interests may appear." Similar riders are on policies of Larsonaire Homes, Inc. and Larson Heights, Inc.

4. With respect to Requests No. 20 and 21, these defendants cannot admit these requests for the reason that the determination contained in Annex 3 to Moses Lake Homes, Inc., et al, Request for Admissions, was communicated to the Grant County Assessor and the Board of County Commissioners by representatives of the United States Air Force and on September 19, 1957 a copy was transmitted by letter to the Treasurer of Grant County with a copy to the Prosecuting Attorney of Grant County by the commanding officer of 62nd Troop Carrier Wing, Larson Air Force Base, Washington. A copy of the letter of transmittal is attached hereto and marked Annex 1. Prior to the date of said transmittal, the matter was discussed by the legal officer of Larson Air Force Base with the Prosecuting Attorney and in such discussions the Prosecuting Attorney appeared to be well informed on the subject.

5. These defendants cannot admit the statements contained in Requests No. 22, 23, 24 and 25 for the reason that the determination, which is Annex 3 to our requests for admissions, was applicable to the years 1955, 1956, 1957 and 1958 and for taxes levied in 1958 for payment in 1959.

6. These defendants cannot admit the allegations contained in Request No. 26 for the reason that municipalities that share in the taxes collected by Grant County do customarily provide streets, curbs and sidewalks such as exist at the Wherry project at Larson Air Force Base.

7. With respect to Request No. 27, these defendants cannot admit the request for the reason that municipalities which share in the taxes collected by Grant County do customarily provide water and sewer systems and maintenance and repair for the same.

8. With respect to Request No. 28, these defendants cannot [103] admit the same for the reason that municipalities which share in the taxes collected by Grant County do customarily provide playground maintenance.

9. With respect to Request No. 29, these defendants cannot admit the same for the reason that police protection of the type normally furnished to a heavily populated area such as that of these Wherry housing projects would customarily have been provided by either the sheriff or by municipal corporations which would participate in the taxes collected by Grant County upon a much more concentrated basis than the Sheriff has supplied upon Larson Air Force Base where police protection is furnished by military authority.

10. With respect to Request 30, these defendants cannot admit the same for the reason that



municipal corporations that share in the taxes collected by Grant County do customarily provide street lighting in comparable built up areas.

11. With respect to Request 31, these defendants cannot admit the same for the reason that municipal corporations that share in the taxes collected by Grant County do customarily provide maintenance, repair and other services for roads and streets in comparable areas.

12. With respect to Request 33, these defendants cannot admit the same for the reason that the actual physical control exercised by these defendants over the properties are circumscribed by the terms of the lease.

13. With respect to Request 35, these defendants cannot admit the same for the reason that during the month of March they were taking inventory and title to the leasehold had been transferred to the government and operations were carried on with a view to turning over to the government all operations on April 1, 1958.

LYCETTE, DIAMOND &  
SYLVESTER,

/s/ By LYLE L. IVERSEN,

Attorneys for Defendants. [104]

Duly Verified. [105]

## ANNEX 1

Headquarters 62nd Troop Carrier Wing (Heavy),  
MATS, United States Air Force, Larson Air  
Force Base, Washington.

SJA

18 Sept. 1957

Grant County Treasurer  
Ephrata, Washington

Dear Sir:

Enclosed herewith is a determination by the Department of the Air Force in implementation of Section 511 of the Housing Act of 1956, 70 Stat. 1110. Also inclosed is a copy of the delegation of authority by the Secretary of the Air Force to the individual designated to make the determination.

This matter has previously been discussed with Mr. Paul Klasen, your prosecuting attorney, who appears to be well informed on this entire subject. If any further clarification of the inclosed correspondence is desired, please feel free to communicate with this headquarters.

Very truly yours,

WM. P. HIPPLER

Colonel, USAF

Executive Officer

2 Incls.: 1. Determination; 2. Delegation of Auth.  
cc: Mr. Paul Klasen, Courthouse, Ephrata, Wn.,  
Mr. Geo. H. Benedict, 1224 Arnold Dr., Larson  
AFB, Wn.; Lycette, Diamond & Sylvester,  
Hoge Bldg., Seattle, Wn.; file. [106]  
[Endorsed]: Filed June 16, 1958.

[Title of District Court and Cause.]

**RESPONSE TO SECOND REQUEST FOR  
ADMISSIONS**

Defendants Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., respond to the Second Request for Admissions submitted by Grant County as follows:

1. These defendants cannot admit the first item for the reason that they have no knowledge of the lease involved in the Offutt Housing Case, except insofar as the same is referred to in the reported case, 351 U. S. 253.

**LYCETTE, DIAMOND &  
SYLVESTER,**

/s/ By **LYLE L. IVERSEN,**

Attorneys for Defendants.

Duly Verified. [107]

[Endorsed]: Filed June 18, 1958.

[Title of District Court and Cause.]

**REQUESTS FOR ADMISSIONS**

Defendants Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., pursuant to Rule 36 of the Rules of Civil Procedure, request defendant Grant County to admit within ten (10) days after the service of this request, upon its counsel that the following facts are true and the attached documents are genuine:

1. The document attached hereto, marked Annex 1, is a true copy of a lease under which Larsonaire Homes, Inc. prior to the institution of the above action held property on Larson Air Force Base and further that said document was executed by the persons whose names appear thereon and was in full force and effect up to the time of the declaration of taking herein.

2. All of the property being condemned in this action was held by the defendants Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc. under leases substantially like and including substantially the same provisions as are included in Annex 1. [109]

3. The Secretary of the Air Force on January 8, 1957 entered an order delegating authority in the form set out in the document annexed hereto, marked Annex 2.

4. On the 4th day of September, 1957, a determination was made by the Deputy Special Assistant for installations of the Air Force on behalf of the Secretary of the Air Force in the form as shown in the document attached hereto, marked Annex 3.

5. That the property of Moses Lake Homes, Inc. sought to be taxed by Grant County is listed by the Assessor on the Detail List of Personal Property in the manner shown on the attached document, marked Annex 4.

6. The property of Larson Heights, Inc. which

Grant County seeks to tax was entered on the Detail List of Personal Property by the Assessor of Grant County in the manner shown on the document attached hereto, marked Annex 5.

7. That the property of Larsonaire Homes, Inc. which Grant County seeks to tax is listed on the Detail Assessment List by the Assessor of Grant County in the manner shown on the document marked Annex 6.

8. That none of the property of any of these three defendants was assessed or listed on the assessment rolls in any manner other than as shown on Annexes 4, 5 and 6.

9. That prior to the time of the declaration of taking herein Grant County had sought to distrain property of Moses Lake Homes, Inc. for taxes in accordance with the distraint notice, a copy of which is attached hereto, marked Annex 7, and it attempted to give notice of treasurer's sale of personal property for delinquent tax as shown on the document attached hereto, marked Annex 8, and no other distraint or attempted sale of the property of Moses Lake Homes, Inc. occurred than as shown on Annexes 7 and 8. [110]

10. That prior to the time of the declaration of taking herein Grant County had sought to distrain property of Larson Heights, Inc. for taxes in accordance with the distraint notice, a copy of which is attached hereto, marked Annex 9, and it attempted to give notice of treasurer's sale of per-

sonal property for delinquent tax as shown on the document attached hereto, marked Annex 10, and no other distraint or attempted sale of the property of Larson Heights, Inc. occurred than as shown on Annexes 9 and 10.

11. That prior to the time of the declaration of taking herein, Grant County had sought to distraint property of Larsonaire Homes, Inc. for taxes in accordance with the distraint notice, a copy of which is attached hereto, marked Annex 11, and it attempted to give notice of treasurer's sale of personal property for delinquent tax as shown on the document attached hereto, marked Annex 12, and no other distraint or attempted sale of the property of Larsonaire Homes, Inc. occurred than as shown on Annexes 11 and 12.

12. In fixing the levies upon the properties of each of these defendants, Officials of Grant County took the assessed value and applied the millage rates in effect thereto and fixed the amount of the tax thereby without any deduction, allowance or credit for amounts determined by the representative of the Secretary of the Air Force as shown in Annex 3.

13. The Assessor of Grant County in fixing the assessed values of the properties herein based his valuations upon fifty percent (50%) of the market value of the physical improvements on the respective properties held by the respective defendants herein, without reference to the market value of the leaseholds of the respective defendants and



without reference to mortgage encumbrances against said leaseholds.

LYCETTE, DIAMOND &  
SYLVESTER,

/s/ By LYLE L. IVERSEN,

Attorneys for Defendants Moses Lake Homes, Inc.,  
Larsonaire Homes, Inc. and Larson Heights,  
Inc.

Acknowledgment of Receipt of Copy attached.

ANNEX I.

Department of the Air Force  
Lease for Private Housing

To Be Insured Under Title VIII, National Housing  
Act

On Larson Air Force Base, Washington

Contract No. AF 45(617)s-57

This Lease, made between the Secretary of the Air Force, party of the first part, representing the United States of America (hereinafter called the Government), and Larson Heights, Inc., a corporation organized and existing under the laws of the State of Washington, with principal place of business at Seattle, Washington, (hereinafter called the Lessee), party of the second part,

Witnesseth:

That, under authority of the Act of August 5, 1947 (5 U.S.C. 626s-3) and Title VIII of the National Housing Act, as amended (12 U.S.C. 1748-

1748h), the Secretary of the Air Force has determined that the lease of the hereinafter described premises will effectuate the purposes of the said Title VIII, and the Secretary, in consideration of the observance and performance by the Lessee of the covenants and conditions hereinafter set forth, hereby leases to the Lessee for a period of seventy-five (75) years, commencing on the date of final execution of this lease by the Government and by the Lessee, subject to termination as hereinafter provided, the land as hereinafter described, to be used for the purpose of erecting, maintaining and operating a housing project, consisting of approximately two hundred (200) units, substantially in accordance with the outline plans and specifications submitted to the Department of the Air Force and in accordance with the detailed plans and specifications to be approved by the Federal Housing Commissioner (hereinafter referred to as the Commissioner). It is understood that if the mortgage which the Commissioner approves for insurance covers a project containing less units than the number specified above, this lease may be renegotiated to reduce the area included herein to a size that the Commissioner determines to be satisfactory for the number of units to be included in the project insured by the Commissioner and to effect a corresponding reduction in the total consideration to be paid the Government. Failure of the Lessee to complete said improvements in whole or in part shall not be grounds for termination of this lease, except as provided in Condition 2 hereof. [112]

The premises leased are hereby described as follows:

All that certain tract or parcel of land situate within Larson Air Force Base, State of Washington, and being more particularly described as follows:

Commencing at the Southeast corner of the Northeast quarter of Section 5, Township 19 North, Range 28 East, Willamette Meridian, and running thence North  $00^{\circ}14'10''$  East 46.03 feet to the point of beginning of the parcel of land herein described; thence South  $71^{\circ}56'19''$  West 1483.39 feet to a point; thence North  $18^{\circ}03'41''$  West 1000.00 feet to a point; thence North  $71^{\circ}56'19''$  East 2485.58 feet to a point; thence South  $18^{\circ}03'41''$  East 1000.00 feet to a point; thence South  $71^{\circ}56'19''$  West 1002.19 feet to the point of beginning, containing 57.061 acres of land, more or less.

Together With the Right of the Lessee to use, jointly with the Government and others, an access road for the purpose of ingress and egress over the following described right-of-way:

All that certain parcel of land situate within Larson Air Force Base, State of Washington, being a strip of land sixty (60) feet wide and lying thirty (30) feet on each side of the following described center line:

Commencing at the Southeast corner of the Northeast quarter of Section 5, Township 19 North, Range 28 East, Willamette Meridian, and running

thence North  $00^{\circ}14'10''$  East 46.03 feet to a point; thence South  $71^{\circ}56'19''$  West 1483.39 feet to a point; thence North  $18^{\circ}03'41''$  West 200.00 feet to the center line and the point of beginning of the right of way herein described; thence South  $71^{\circ}56'19''$  West 33.16 feet to a point on the northeasterly boundary of the Ephrata-Moses Lake Highway right of way.

1 This Lease is granted subject to the following provisions and conditions:

1. That the Lessee shall pay to the Government rental in the amount of One Hundred (\$100.00) Dollars per annum payable annually in advance. Compensation will be made payable to the Treasurer of the United States and forwarded by the Lessee direct to: Commanding Officer, Larson Air Force Base, Washington.

2. That an application for mortgage insurance under Title VIII of the National Housing Act, as amended, for the said housing project, including Exhibits required therein, shall be submitted to the Federal Housing Administration within forty-five (45) days from the effective date of this lease. In the event that the Commissioner does not issue a commitment to insure pursuant to such application; or in the event that a commitment to insure is issued and the mortgage pursuant thereto is not initially endorsed for insurance within ninety (90) days from the date of such issuance or any extensions thereof, the Government, at its option, may effect a termination of this lease and all the rights of the Lessee thereunder; [113] and the Govern-

ment may at once re-enter the leased property and repossess itself thereof and remove all persons therefrom or may resort to any summary action to recover same: provided, however, that written notice of intention to so terminate this lease shall be given the Lessee, the Commissioner and the proposed mortgagee, if any, at least fifteen (15) days prior to said termination.

3. (a) That the Lessee shall lease all units of the housing project to such military and civilian personnel of the Army, Navy, Marine Corps or Air Force (including Government contractors' employees) assigned to duty at the military installation or in the area where such property is located, as are designated by the Commanding Officer, Larson Air Force Base; provided, however, that in the event the said Commanding Officer fails to designate military or civilian personnel of the Army, Navy, Marine Corps or Air Force (including Government contractors' employees) to whom the unit or units shall be leased, within thirty (30) days after receipt of written notice from the Lessee that such unit or units are available for lease, or such designated personnel fails to execute a lease within said thirty (30) day period or fails to indicate in writing to the Lessee within said thirty (30) day period that he will execute the lease, or refuses to execute the lease within five (5) days after presentation by the Lessee for execution, if such lease is presented for execution subsequent to the expiration of said thirty (30) day period, the Lessee may lease such unit or units to persons other than said

military or civilian personnel. Any lease executed by the Lessee will provide that rental for the unit accepted by such designated personnel shall accrue to the Lessee from the date of occupancy or from the expiration date of the said thirty (30) day period, whichever is first. The execution of a lease or written notice by such designated personnel that he will execute a lease shall be deemed to be an acceptance of the unit.

(b) That any lease granted to said military or civilian personnel shall be for a term of one (1) year and shall provide for automatic renewals thereafter from month to month until said military or civilian personnel gives thirty (30) days written notice of relinquishment. Any such lease shall also provide that the tenant shall, upon receipt of orders permanently transferring him to another military station or in the event of tenant's separation from military service or civilian employment, terminate his tenancy by giving thirty (30) days written notice of termination of tenancy. [114]

(c) That in the event any unit is leased to persons other than said military or civilian personnel, such lease shall be limited to a term of one (1) year and shall provide for automatic renewals thereafter from month to month until the said Commanding Officer exercises his right to designate a tenant and gives written notice to the Lessee as hereinafter provided. Lessee shall notify the said Commanding Officer at least sixty-five (65) days prior to the expiration or termination of any firm



one (1) year lease so granted, and the said Commanding Officer shall thereafter, at any time, have the right to designate a tenant for any unit on which said one (1) year lease shall have expired or terminated, by giving to Lessee notice of such designation at least thirty-five (35) days prior to the expiration or termination of any one (1) year lease, or at least five (5) days prior to the beginning of any automatically renewable monthly term, the former to be effective at the end of such firm term period, and the latter at the end of the first monthly term running in full after the giving of such notice. If such designated tenant fails to execute a lease on or before the effective termination date of the lease for said unit or fails to indicate in writing to the Lessee on or before the effective termination date of the lease for said unit that he will execute the lease or refuses to execute the lease within five (5) days after presentation of a lease by the Lessee for execution, if such lease is presented for execution subsequent to the effective termination date of the lease for said unit, the Lessee may lease such unit to persons other than said designated tenant. Rental for the unit accepted by such designated tenant shall accrue to the Lessee from the date of occupancy or the effective termination date of the lease for said unit, if the unit has been made available for occupancy by the Lessee, whichever is first. If the unit has not been made available for occupancy by the Lessee upon the effective termination date of the lease for said unit, rental shall accrue to the Lessee from the date of occu-

pancy or the expiration date of a five (5) day written notice by the Lessee to the designated tenant that the unit is available for occupancy, whichever is first. The execution of a lease or written notice by such designated personnel that he will execute a lease shall be deemed to be an acceptance of the unit. Any lease granted pursuant to this Condition 3(c) to persons other than said military or civilian personnel shall reserve unto the Lessee the right to revoke the lease in the event there is a declaration of national emergency by the President or Congress of the United States and the Lessee hereby agrees that it will during the period of any such national emergency revoke any and/or all such leases at the written request of the said Commanding Officer. Nothing contained in this paragraph shall be construed as contemplating the eviction of tenants in violation or contravention of Federal, State, or local law in [115] restriction of such eviction, in the event, and in the event only, that such law is applicable to housing units erected on the said military installation.

4. That if at any time during the term of this lease there is no mortgage insured under the National Housing Act covering the interest of the Lessee and the leased premises are not under the control of the Commissioner, the rental rates for leases granted in accordance with Condition 3 shall be such rates as are agreed upon from time to time by the said Commanding Officer and the Lessee, provided, however, that, in case this lease shall be acquired by the Commissioner and subsequently as-

signed or sold, the rents shall not be reduced below the schedule of rents then in effect without the consent of the then owner and holder of the leasehold interest.

5. That the Lessee shall neither transfer nor assign this lease without the prior written approval of the Secretary of the Air Force. This provision shall not apply to the leasing of the individual units to tenants or to the placing of Deeds of Trust, mortgages or similar liens, on the leased premises or to voluntary or involuntary transfers in pursuance of such security instruments or to any transfer in pursuance of, or subsequent to, any transfer of the leased premises under the contract of mortgage insurance.

6. That the Lessee shall at all times exercise due diligence in the protection of the leased premises against damage or destruction by fire or other causes.

7. That the Lessee shall comply with all laws, ordinances, and regulations, that are applicable to the leased area, with regard to construction, sanitation, licenses or permits to do business, and other matters.

8. That the Lessee shall pay to the proper authority, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises. In the event any taxes, assess-

ments, or similar charges are imposed with the consent of the Congress of the United States upon the property owned by the Government and included in this lease (as opposed to the leasehold interest of the Lessee therein), this lease shall be renegotiated so as to accomplish an equitable reduction in the rental provided above, which shall not be greater than the difference between the amount of such taxes, assessments, or similar charges and the amount of any taxes, assessments or similar charges which were imposed upon such Lessee with respect to his leasehold interest in the leased premises prior to the granting of such [116] consent by the Congress of the United States; provided, however, that the amount of such reduction in rental shall in no event be more than 50 percent of the rental provided above; provided, further, that in the event that the parties hereto are unable to agree, within ninety (90) days from the date of the imposition of such taxes, assessments, or similar charges, upon an equitable reduction in rental, such failure to agree shall be considered to be a question of fact within the meaning of the clause of this lease relating to disputes.

9. That it is agreed that the Government will furnish upon a reimbursable basis the following services to the Lessee's housing project during the term of this lease but in no case beyond the period for which the facilities from which such services are to be furnished remain under the control of the Department of the Air Force, provided that nothing herein shall bind the Government to expand

its existing facilities or to furnish any services which it purchases from private sources, unless it is determined that such services cannot reasonably be furnished from private sources direct to the Lessee. The Government shall not be responsible for any damages as a result of temporary failure to provide the services hereinafter set forth:

a. Fire Protection.

b. The Air Force intends to prescribe and maintain the same safety and security for the housing project as for the rest of the base.

10. That the Lessee shall have the right to permit public utility companies to extend water, sewer, gas, telephone and electric power lines on the leased premises for the exclusive purpose of furnishing utilities to the housing project, subject to all provisions and conditions of this lease.

11. The buildings and improvements erected by the Lessee, constituting the aforesaid housing project, shall be and become, as completed, real estate and part of the leased lands, and property of the United States, leased to Lessee for the purpose of serving the governmental and public purpose of providing military housing in accordance with Title VIII of the National Housing Act, and in accordance with the provisions of this lease, and subject to the term of this lease, and any renewal or extension of this lease. That upon the expiration of this lease, or earlier termination, all improvements made upon the leased premises shall remain the property of the Government without compensation, provided

that the provisions of this Condition shall not apply to facilities erected by utility companies on the leased premises for the purpose of furnishing utility services to the housing project. [117]

12. That the use and occupation of the leased premises shall be subject to such rules and regulations as the said Commanding Officer may from time to time reasonably prescribe for military requirements for safety and security purposes, consistent with the use of the leased premises for housing.

13. That the Lessee shall, at any time after there is no Federal Housing Administration insured mortgage on the property and the leased premises are not under the control of the Commissioner, adhere to such standards of maintenance and repair of the housing project as shall be mutually agreed upon between the Lessee and the Commanding Officer; that the Lessee shall observe and perform in accordance with all the laws, ordinances, rules and regulations relating to health and sanitation for the time being applicable to the said leased premises; and will indemnify and save harmless the Government against all actions, suits, claims and damages by whomsoever brought or made by reason of the failure to keep said buildings and improvements in good order, condition and repair, or by reason of the non-observance of or non-performance in accordance with the said laws, ordinances, rules and regulations, or of this lease; and that the Lessee will permit the Government, at all



reasonable times during the said period, to enter the said premises and examine the state of repair and condition thereof and will commence forthwith, after notice has been given by the Government, such work as may be necessary to return the property to a condition conforming to the said standard of maintenance and repair.

14. That the right is hereby reserved to the Government, its officers, agents and employees to enter upon the leased premises at any time for the purpose of inspection and when otherwise deemed necessary for the protection of the interests of the Government, provided that if such representatives of the Government desire to enter the improvements placed upon said premises by the Lessee the opportunity shall be afforded to the Lessee's representatives to accompany said representative of the Government. The Lessee shall have no claim of any character on account of any such inspection against the Government or any officer, agent or employee thereof.

15. The Government shall not be responsible for any damage to property or injury to person arising out of the use or occupancy of the leased premises by the Lessee or any sublessee, and the Lessee shall indemnify and save the Government harmless from any and all claims for any such damage or injuries, provided, that the provisions of this Condition 15 shall not apply to such claims as are cognizable under the Federal Tort Claims Act, as amended.

16. That any property of the United States dam-

aged or destroyed by the Lessee incident to the Lessee's use and occupation of the leased premises, shall be promptly repaired or replaced by the Lessee to the satisfaction of the said Commanding Officer, or in lieu of such repair or replacement the Lessee shall, if so required by the said Commanding Officer, pay to the United States an amount sufficient to compensate for the loss sustained by the United States by reason of damage to or destruction of Government property.

17. That the Government may terminate this lease at any time by giving sixty (60) days written notice through the Secretary of the Air Force by registered mail, to the Lessee and known security holders in the event that rental is not paid in accordance with Condition 1 of this lease after thirty (30) days written notice has been given by the said Secretary of the Air Force, by registered mail, at the last post office address on file, to the Lessee and known security holders. Security holders or any Government agency directly or indirectly interested may make payments of rental direct to the Government. If and so long as the leasehold estate of the Lessee is encumbered by a mortgage, the Government agrees to give to the holder of such mortgage (and if such mortgage is insured under the National Housing Act, to the Commissioner) notice of any default, simultaneously giving such notice to the Lessee, and the holder of any such mortgage and/or the Commissioner shall have the right within the period limited by any such notice and for an additional period of ninety (90) days there-

after, to take such action or to make such payment as may be necessary or appropriate to cure any such default. Anything to the contrary, notwithstanding, so long as there is upon the Lessee's interest under this lease a mortgage insured by or held by the Commissioner or so long as the lease of the leased premises is in the said Commissioner, the Government shall not, without the written consent of the Commissioner, exercise its right to terminate this lease for any cause whatsoever, within a period of nine (9) months from the date the Commissioner shall have been given written notice of the existence of default. Within said nine (9) months period, the Commissioner may reinstate said lease by causing any and all existing defaults to be cured or may exercise the right granted the mortgagee under this paragraph. All notices, demands and requests which may be or are required to be given by the Government to the Lessee, or to any mortgagee or mortgagees of the leasehold estate, or to the Commissioner, if any such mortgage or mortgages are insured under the National Housing Act, shall be sent by the United States registered mail, postage prepaid, addressed to the Lessee, mortgagee or mortgagees of the leased premises and/or the Commissioner at such place or places as such Lessee, mortgagee or mortgagees and/or the Commissioner may from time to time designate in a written [119] notice to the Government.

18. That except as otherwise specifically provided in this lease, all disputes concerning questions of

fact or establishment of rental rates or standards of maintenance and repair after there is no mortgage held or insured by the Federal Housing Administration on the property and the leased premises are not under the control of the Commissioner, which may arise under this lease, and which are not disposed of by mutual agreement, shall be decided by the said Commanding Officer, who shall reduce his decision to writing and mail a copy thereof to the Lessee at its address shown herein. Within thirty (30) days from said mailing the Lessee may appeal to the Secretary of the Air Force, whose written decision or that of his designated representative or representatives or board, shall be final and conclusive upon the parties hereto. Pending decision of a dispute hereunder, the Lessee shall proceed with the performance of this lease and in accordance with the Commanding Officer's decision. The provisions of this paragraph shall not be deemed to limit the provisions of Condition 4 of this lease with respect to rents.

19. That all uranium, thorium, and all other materials determined pursuant to Section 5 (b) (1) of the Atomic Energy Act of 1946 (60 Stat. 761) to be peculiarly essential to the production of fissionable material, contained in whatever concentration, in deposits in the lands covered by this instrument, are hereby reserved for the use of the Government, together with the right of the Government through its authorized agents or representatives at any time to enter upon the land and prospect for, mine, and remove the same, making just

compensation for any damages or injury occasioned thereby. However, such land may be used, and any rights otherwise acquired by this disposition may be exercised, as if no reservation of such materials had been made: except that, when such use results in the extraction of any such material from the land in quantities which may not be transferred or delivered without a license under the Atomic Energy Act of 1946, as it now exists or may hereafter be amended, such material shall be the property of the United States Atomic Energy Commission, and the Commission may require delivery of such material to it by any possessor thereof after such material has been separated as such from the ores in which it was contained. If the Commission requires the delivery of such material to it, it shall pay to the person mining or extracting the same, or to such other persons as the Commission determines to be entitled thereto, such sums, including profits, as the Commission deems fair and reasonable for the discovery, mining, development, production, extraction and other services performed with respect to such material prior to such delivery, but such payment shall not include any amount on account of the value of such material before removal from its place of [120] deposit in nature. If the Commission does not require delivery of such material to it, the reservation hereby made shall be of no further force or effect.

20. That the Lessee, during the term of this lease, will, at its own cost and expense, insure and keep insured against fire the buildings that may

hereafter be erected on the leased premises in an amount to be determined by the Government, payable both to the Lessee and any security holder, jointly as their respective interests may appear. Such insurance shall state that the leased premises are held under a seventy-five (75) year lease. In the event of a partial loss or damage to the improvements on the leased premises by fire or otherwise, the Lessee shall within a reasonable time thereafter restore the improvements to their former condition. In the event of a complete destruction of any one or more of the buildings erected on said premises the Government and the Lessee shall have sixty (60) days in which to determine whether the premises shall be rebuilt. A determination by either party that it does not desire to rebuild the premises shall be binding on both parties of this lease, in which event this lease may be renegotiated to reduce the area included therein with an appropriate reduction in rental to be paid by Lessee. This Condition 20 shall be inoperative so long as the interests of the Lessee are covered by a mortgage insured or held by the Commissioner or the leased premises are under the control of the Commissioner.

21. That it is further Covenanted and Agreed between the Government and the Lessee that the covenants and agreements herein contained shall bind and inure to the benefit of the Government, its assigns, and the Lessee, its successors and assigns.



22. That no member of or delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this lease or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this lease if made with a corporation for its general benefit.

23. That all notices to be given pursuant to this lease shall be addressed, if to the Lessee, to Larson Heights, Inc., 1021 Westlake North, Seattle, Washington; if to the Government, to Commanding Officer, Larson Air Force Base, Washington, or as may from time to time otherwise be directed by the parties. All notices to be given the Commissioner or the Federal Housing Administration pursuant to the terms of this lease shall be sent to the director of the insuring office of the Federal Housing Administration where the application for mortgage insurance is to be or is filed. Notice shall be deemed to have been duly given if and when enclosed in a properly sealed envelope or wrapper, addressed as aforesaid, marked as registered [121] mail, with registry fee prepaid, and deposited postage prepaid in a post office or branch post office regularly maintained by the Government.

24. That if more than one Lessee is named in this lease the obligation of said Lessees herein contained shall be joint and several obligations.

25. That, except as otherwise specifically provided, the terms Commanding Officer and Secretary of the Air Force, as used herein, shall include their duly appointed representatives, as well as their suc-

cessors and the duly appointed representatives of such successors.

26. This lease is not affected by Title VI of the Act of Congress approved September 28, 1951 (P.L. 155, 82nd Congress, 1st Session).

In Witness Whereof I have hereunto set my hand and affixed the seal of the Department of the Air Force, by direction of the Secretary of the Air Force, this 2nd day of August, 1954.

[Seal] /s/ GEORGE S. ROBINSON,  
Deputy Special Assistant for Installations to the  
Secretary of the Air Force.

Witnesses:

/s/ ELEANOR M. LONGMORE.

/s/ JEROME J. FRICKER.

Commonwealth of Virginia  
County of Arlington—ss.

This day before me, a Notary Public, personally appeared George S. Robinson, to me well known and well known to me to be the individual described in and who executed the foregoing instrument, and acknowledged before me that he executed the same for the purposes therein expressed, as Deputy Special Assistant for Installations to the Secretary of the Air Force.

Witness my hand and official seal this 2nd day of August, 1954.

/s/ KARL J. BILEK,  
Notary Public.

My Commission expires: 10/1/56. [122]

Larson Heights, Inc, has caused this lease to be executed by Cliff Mortensen, its President, its corporate seal to be attached, and attested by its Secretary on this 2nd day of August, 1954.

[Corporate Seal]

LARSON HEIGHTS, INC.,

/s/ By CLIFF MORTENSEN,

President.

Attest:

.....  
Secretary.

Witnesses: (Illegible)

/s/ MARGARET N. LARSON.

State of Washington

County of Grant—ss.

On this 2nd day of August, 1954, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Cliff Mortensen and J. E. Swanson, Jr. to me known to be the President and Secretary, respectively, of Larson Heights, Inc., the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute the said instrument and that the seal affixed is the corporate seal of said corporation.

Witness my hand and official seal hereto affixed

the day and year in this certificate above written.

/ / [Illegible]

Notary Public in and for the State of Washington  
residing at Moses Lake. My Commission expires 7-16-56.

### Certificate

I, J. E. Swanson, Jr., certify that I am the Secretary of the Corporation named as Lessee herein; that Cliff Mortensen, who signed this lease on behalf of the Lessee, was then President of said corporation; that said lease was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

..... [123]

### ANNEX II.

(Copy)

Department of the Air Force

No. 706.1

United States of America

Date: January 8, 1957

MCMXIVII

Secretary of the Air Force

### Order

**Subject: Taxes on Wherry Housing Projects.**

1. Pursuant to Department of Defense Directive No. 4165.30, November 16, 1956, the Special Assistant and Deputy Special Assistant for Installations are hereby designated to determine the amounts which may appropriately be deducted from taxes or assessments on Wherry projects under Section 408 of the Housing Amendments of 1955, 69 Stat.

653, as amended by Section 511 of the Housing Act of 1956, 70 Stat. 1110.

2. This order is issued in accordance with Air Force Regulation 11-18, dated July 16, 1954, Subject: Instruments of Delegation or Assignment of Statutory Authority.

/s/ James H. Douglas /  
t/ JAMES H. DOUGLAS  
Under Secretary

Certified a True Copy:

/s/ R. W. ALBRECHT  
Captain, USAF [124]

ANNEX III.

Copy

Copy

Department of the Air Force  
Washington

Office of the Secretary

4 Sep 1957

### DETERMINATION

Subject: Determination under Section 408 of the Housing Amendments of 1955, as amended; Larson Air Force Base, Washington (FHA Projects Nos. 171-80001-7-8)

1. I have considered the information with respect to the subject project, the lessee of which believes that the tax for 1956 will be equal to approximately \$65,000.00. Pursuant to my designation under Section 408 of the Housing Amendments of 1955, 69 Stat. 653, as amended by Section 511 of the Housing Act of 1956, 70 Stat. 1110, I have determined \$111,358.65 to be equal to (1) any pay-

ments made by the Federal Government to the local taxing or other agencies involved with respect to such property, plus (2) such amount as may be appropriate for expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, roads, sidewalks, curbs, gutters, water and sewer system, fire lines and hydrants, playgrounds, street lighting, fire protection, garbage disposal, snow removal and sewer service, or any other service or facilities which are customarily provided by the State, county, city or other local taxing authority with respect to other similar property of similar value. This determination is not to be considered an expression of opinion by me or the Department of Defense with respect to the validity or propriety of the tax bills to which it is applied.

2. The items included in this determination are as follows:

Payments for operation of schools pertaining to dependents living in Wherry projects pursuant to P. L. 874, 61st Congress: \$46,646.57.

Funds paid under P.L. 615 for years January 1953 to June 1956, inclusive, \$94,092.00 depreciated at 4%: \$3,763.68.

Appropriate amounts for expenditures for services and facilities.

Provisions by Air Force of streets, curbs and sidewalks not including entrance walks and drives, cost \$65,658.56, amortized 25 yrs. life: \$2,626.35.

Provision by lessees of streets and street signs, cost \$106,416.91, amortized 25 yrs. life: \$4,258.68.



Provision by Air Force of water and sewer system, cost \$132,761.00, amortized 25 yrs. life: \$5,310.44.

Provisions by lessees of curbs and sidewalks, cost \$103,726.51, amortized 25 yrs. life: \$4,149.06,

Provision by lessees of water and sewer system, cost \$185,426.00, amortized 25 yrs. life: \$7,417.04.

Expenditures by Lessee:

Street lighting: \$1,708.80; Sewer charge: \$2,800.00; Sewer line maintenance: \$250.00; Street maintenance and repair: \$682.02; Street sanding: \$100.00; Playground maintenance: \$2,100.00.

Expenditures by Air Force:

Police Protection: \$23,248.00; Access Roads—Maintenance: \$6,300.00.

3. The Chief, Family Housing Division, Directorate of Facilities Support, DCS/O, will make copies of this determination available to all interested parties.

/s/ GEORGE S. ROBINSON,

Deputy Special Assistant for  
Installations

Certified a True Copy:

/s/ R. W. ALBRECHT,

Captain, USAF

[126]

#### ANNEX IV.

#### DETAIL LIST OF PERSONAL PROPERTY

Schedule of all Personal Property belonging to Moses Lake Homes Inc., P. O. Address: Moses Lake, Wash. (M. L. Air Force Base.)

Property located at Larson Air Force Base near  
Moses Lake, Wash.

\* \* \* \* \*

Rd. Dist. 2, Sch. Dist. 161, Fire Dist. ...., Hos-  
pital Dist. 1, Cemetery Dist. ...., PUD Dist. ....  
County of Grant and State of Washington, as re-  
quired by Laws now in force in this State.

Property Assessed by County Assessor in 1957 for  
1958 Taxes (Not Including Operating Properties  
of Utilities Assessed by State Tax Commission).

\* \* \* \* \*

27. Improvements upon land the fee of which is  
vested in the United States, the state, or any poli-  
tical subdivision thereof (over) (Assessed Value  
Dollars Only) \$500,000.

\* \* \* \* \*

30. Total assessed value (lines 1 to 29, incl.)  
\$500,000.

\* \* \* \* \*

32. Taxable assessed value of above (line 30  
minus line 31) \$500,000.

\* \* \* \* \*

### Affidavit of Person Listing The Above Described Property

State of Washington,  
County of Grant—ss.

I, ....., do solemnly swear that this  
Detail List contains full and correct statements of  
all property subject to taxation in this County,  
which I or any firm of which I am a member, or any  
corporation, association or company of which I am

president, cashier, secretary, managing agent, or other responsible officer, owned, claimed, possessed or controlled on the first day of January, 19... at 12 o'clock, meridian, and which is not already assessed for said year or otherwise noted upon this detail list and that I have not in any manner whatever transferred or disposed of any property or placed any property out of said county or my possession for the purpose of avoiding any assessment upon the same, or of making this statement.

Subscribed and sworn to before me this 18th day of Dec., 1957.

/s/ J. P.,

County Assessor.

\*\*\*\*\*

[Reverse Side.]

Remarks: This listing covers 400 rental units at Larson Air Force Base near Moses Lake, Wash. Court Order prevented earlier listing.

\*\*\*\*\*

## ANNEX V.

### DETAIL LIST OF PERSONAL PROPERTY

Schedule of all Personal Property belonging to Larson Heights, Inc., P. O. Address: 1021 Westlake North, Seattle, Wash.

\*\*\*\*\*

Property located at Larson Air Force Base.  
Rd. Dist. 2, Sch. Dist. 161, Fire Dist. ...., Hospital Dist. 1, Cemetery Dist. ...., PUD Dist. ....  
County of Grant and State of Washington, as required by Laws now in force in this State.

Property Assessed by County Assessor in 1957 for 1956 Taxes. (Not Including Operating Properties of Utilities Assessed by State Tax Commission.)

\* \* \* \* \*

27. Improvements upon land the fee of which is vested in the United States, the state, or any political subdivision thereof (Assessed Value Dollars Only) \$250,000.

\* \* \* \* \*

30. Total assessed value (lines 1 to 29, incl.) \$250,000.

\* \* \* \* \*

32. Taxable assessed value of above (line 30 minus line 31) \$250,000.

\* \* \* \* \*

### Affidavit of Person Listing the Above Described Property

State of Washington,  
County of Grant—ss.

I, ....., do solemnly swear that this Detail List contains full and correct statements of all property subject to taxation in this County, which I or any firm of which I am a member, or any corporation, association or company of which I am president, cashier, secretary, managing agent, or other responsible officer, owned, claimed, possessed or controlled on the first day of January, 19.., at 12 o'clock, meridian, and which is not already assessed for said year or otherwise noted upon this detail list and that I have not in any manner whatever transferred or disposed of any

property or placed any property out of said county or my possession for the purpose of avoiding any assessment upon the same, or of making this statement.

Subscribed and sworn to before me this 3rd day of January, 1957.

/s/ JOHN POWERS,

County Assessor.

\* \* \* \* \* [128]

[Reverse Side.]

\* \* \* \* \*

Remarks: This property assessed as omitted property for the year 1956, under provision of R.C.W. 84.40.080.

Above mentioned property consists of 200 rental units.

\* \* \* \* \*

[Stamped]: Received Jan. 4, 1957. Nelse Mortensen & Company.

## ANNEX VI.

### DETAIL LIST OF PERSONAL PROPERTY

Schedule of all Personal Property belonging to Larsonaire Homes, Incorporated, P. O. Address: 1021 Westlake North, Seattle, Wash.

Property located at Larson Air Force Base.

\* \* \* \* \*

Rd. Dist. 2, Sch. Dist. 161, Fire Dist. —, Hospital Dist 1, Cemetery Dist. —, PUD Dist. —, County of Grant and State of Washington, as required by Laws now in force in this State.

Property Assessed by County Assessor in 1957  
for 1956 Taxes. (Not Including Operating Proper-  
ties of Utilities Assessed by State Tax Commis-  
sion.)

\* \* \* \* \*

27. Improvements upon land the fee of which is  
vested in the United States, the state, or any poli-  
tical subdivision thereof (Assessed Value Dollars  
Only) \$250,000.

\* \* \* \* \*

30. Total assessed value (lines 1 to 29, incl.)  
\$250,000.

\* \* \* \* \*

32. Taxable assessed value of above (line 30  
minus line 31) \$250,000.

\* \* \* \* \*

Affidavit of Person Listing the Above  
Described Property

State of Washington,  
County of Grant—ss.

I, ....., do solemnly swear that this  
Detail List contains full and correct statements of  
all property subject to taxation in this County,  
which I or any firm of which I am a member, or  
any corporation, association or company of which I  
am president, cashier, secretary, managing agent, or  
other responsible officer, owned, claimed, possessed  
or controlled on the first day of January, 19—, at 12  
o'clock, meridian, and which is not already assessed  
for said year or otherwise noted upon this detail  
list and that I have not in any manner whatever



transferred or disposed of any property or placed any property out of said county or my possession for the purpose of avoiding any assessment upon the same, or of making this statement.

Subscribed and sworn to before me this 3rd day of January, 1957.

JOHN POWERS,  
County Assessor.

\* \* \* \* \* [129] \

[Reverse Side.]

\* \* \* \* \*

Remarks: This property assessed as omitted property for the year 1956 under the provisions of R.C.W. 84.40.080.

Above mentioned property consists of 200 rental units:

\* \* \* \* \*

[Stamped]: Received Jan. 4, 1957. Nelse Mortensen & Company.

## ANNEX VII.

### DISTRAINT NOTICE

State of Washington,  
County of Grant—ss.

In The Matter of Delinquent Taxes levied for the years 1955, 1956 and 1957 upon personal property assessed to Moses Lake Homes, Inc.

Description of Property: Improvements on Government Land (500 dwellings).

Assessed Valuation: \$500,000.

|                                  |             |
|----------------------------------|-------------|
| Amount of tax for year 1955 ..   | \$21,150.00 |
| Amount of tax for year 1956 ..   | 32,925.00   |
| Tax 1957 .....                   | 31,330.00   |
| Costs to date Int to 3/4/1958 .. | 11,787.95   |
| Costs to date .....              | 6.45        |

---

Total due .....\$97,199.40

To Moses Lake Homes, Inc., owner or reputed owner of the above described property:

You are hereby notified that in accordance with the revenue Laws of the State of Washington (Chapter 33, Laws of 1933), I, Robert S. O'Brien, Treasurer of Grant County, have levied upon and taken possession of the property, hereinabove described, and you are hereby distrained from disposing of said goods or chattels, or any part thereof, until all taxes, interest, costs and accruing costs have been paid in full.

Witness my hand and seal this 21st day of January, 1958.

/s/ ROBERT S. O'BRIEN,  
County Treasurer,

/s/ By MARGARET HANES,  
Deputy. [130]

### ANNEX VIII.

### COUNTY TREASURER'S SALE

### Notice of Sale of Personal Property For Delinquent Tax

By virtue of a Notice in Distrain issued by the County Treasurer of Grant County, State of Wash-

ington, pursuant to the revenue laws of the State of Washington, as amended by Chap. 33, Laws of 1933, for collection of delinquent tax due Grant County, notice is hereby given that I, Robert S. O'Brien, County Treasurer of Grant County, Washington, have distrained and taken possession of the following described personal property, to-wit: 500 dwellings (Improvements on land owned by USA), being the property of Moses Lake Homes, Inc., owner or reputed owner thereof, upon which is due personal property tax and interest for the years 1955, 1956 and 1957 amounting to Ninety-seven thousand one hundred ninety-two and 95/100ths Dollars and that I will proceed to sell the above described personal property at public auction, to the highest and best bidder for cash, to satisfy said tax, interest and cost, at Place of business, Larson Air Force Base in Grant County, Washington, at 10 o'clock a.m. on Tuesday, the 4th day of March, 1958.

Given under my hand this 21st day of January, 1958.

/s/ ROBERT S. O'BRIEN,  
County Treasurer.

|                |                   |
|----------------|-------------------|
| Taxes .....    | \$85,405.00       |
| Interest ..... | 11,787.95         |
| Costs .....    | 6.45              |
| Total .....    | <hr/> \$97,199.40 |

## ANNEX IX.

## DISTRRAINT NOTICE

State of Washington,  
County of Grant—ss.

In The Matter of Delinquent Taxes levied for  
the year 1957 upon personal property assessed to  
Larson Heights, Inc.

Description of Property: 300 dwellings (Improvements on property owned by USA).

Assessed Valuation: \$100,000.

Amount of tax for year 1957 ..\$18,798.00

Costs to date ..... 3.25

Total due .....\$18,801.25

To Larson Heights, Inc., owner or reputed owner  
of the above described property:

You are hereby notified that in accordance with  
the revenue Laws of the State of Washington  
(Chapter 33, Laws of 1933), I, Robert S. O'Brien,  
Treasurer of Grant County, have levied upon and  
taken possession of the property, hereinabove de-  
scribed, and you are hereby distrained from dis-  
posing of said goods or chattels, or any part thereof,  
until all taxes, interest, costs and accruing costs  
have been paid in full.

Witness my hand and seal this 21st day January,  
1958.

/s/ ROBERT S. O'BRIEN,  
County Treasurer. [132]

## ANNEX X.

## COUNTY TREASURER'S SALE

Notice of Sale of Personal Property  
For Delinquent Tax

By virtue of a Notice in Distrainment issued by the County Treasurer of Grant County, State of Washington, pursuant to the revenue laws of the State of Washington, as amended by Chap. 33, Laws of 1933, for collection of delinquent tax due Grant County, notice is hereby given that I, Robert S. O'Brien, County Treasurer of Grant County, Washington, have distrained and taken possession of the following described personal property, to-wit: 300 dwellings (Improvements on property owned by USA); being the property of Larson Heights, Inc., owner or reputed owner thereof, upon which is due personal property tax and interest for the year 1957 amounting to Eighteen thousand seven hundred ninety-eight and ~~no~~ 100ths Dollars and that I will proceed to sell the above described personal property at public auction, to the highest and best bidder for cash, to satisfy said tax, interest and cost, at Place of business, Larson Air Force Base, in Grant County, Washington, at 10 o'clock a.m. on Tuesday, the 4th day of March, 1958.

Given under my hand this 21st day of January, 1958.

/s/ ROBERT S. O'BRIEN,

Treasurer. [133]

Taxes ..... \$18,798.00

Costs to date ..... 3.25

Total ..... \$18,801.25

## ANNEX XI.

## DISTRAINT NOTICE

State of Washington,  
County of Grant—ss.

In The Matter of Delinquent Taxes levied for the years 1956 and 1957 upon personal property assessed to Larsonaire Homes, Inc.

Description of Property : 200 dwellings (Improvements on Land owned by USA).

Assessed Valuation: \$100,000.

Amount of tax for year 1957 .. \$18,798.00

Amount of tax for year 1956 .. 21,750.00

Costs to date ..... 3.25

Total due ..... \$40,551.25

To Larsonaire Homes, Inc., owner or reputed owner of the above described property:

You are hereby notified that in accordance with the revenue Laws of the State of Washington (Chapter 33, Laws of 1933), I, Robert S. O'Brien, Treasurer of Grant County, have levied upon and taken possession of the property, hereinabove described, and you are hereby distrained from disposing of said goods or chattels, or any part thereof, until all taxes, interest, costs and accruing costs have been paid in full.

Witness my hand and seal this 21st day of January, 1958.

/s/ ROBERT S. O'BRIEN,  
County Treasurer. [134]



## ANNEX XII.

## COUNTY TREASURER'S SALE

## Notice of Sale of Personal Property

## For Delinquent Tax.

By virtue of a Notice in Dstraint issued by the County Treasurer of Grant County, State of Washington, pursuant to the revenue laws of the State of Washington, as amended by Chap. 33, Laws of 1933, for collection of delinquent tax due Grant County, notice is hereby given that I, Robert S. O'Brien, County Treasurer of Grant County, Washington, have distrained and taken possession of the following described personal property, to-wit: 200 dwellings (Improvements on land owned by USA), being the property of Larsonaire, Homes, Inc., owner or reputed owner thereof, upon which is due personal property tax and interest for the years 1956 and 1957 amounting to Forty thousand five hundred forty-eight and no/100ths Dollars and that I will proceed to sell the above described personal property at public auction, to the highest and best bidder for cash, to satisfy said tax, interest and cost, at Place of business, Larson Air Force Base, in Grant County, Washington, at 10 o'clock a.m. on Tuesday, the 4th day of March, 1958.

Given under my hand this 21st day of January, 1958.

/s/ ROBERT S. O'BRIEN,  
Treasurer. [135]

|                     |                    |
|---------------------|--------------------|
| Taxes .....         | \$40,548.00        |
| Costs to date ..... | 3.25               |
| Total .....         | <u>\$40,551.25</u> |

[Endorsed]: Filed June 16, 1958.

[Title of District Court and Cause.]

## REPLY OF GRANT COUNTY FOR REQUEST FOR ADMISSIONS

Grant County, Washington, a Municipal Corporation, one of the above-named defendants, replies to the defendants, Moses Lake Homes, Inc., et al Requests for Admissions as follows:

### I.

As to Item No. 1; denies that marked Annex 1 is a true copy of a lease of Larsonaire Homes, Inc., but does admit that marked Annex No. 1 is a true copy of a lease between the Larson Heights, Inc., and the Secretary of the Air Force.

### II.

Admits Items Nos. 2, 3 and 4.

### III.

Admits Item No. 5 with the exception that there are other detail lists for other years.

### IV.

As to Items No. 6 and 7; admits the same with the exception that there are other similar detail lists for other years, and that the assessed valuation as indicated on Annexes 5 and 6 should be \$300,000.00 instead of \$250,000.00.

### V.

As to Item No. 8; denies the same. [136]

### VI.

Admits Items No. 9, 10, and 11 with the exception

that the property was distrained and Notice of Treasurer's Sale of Personal Property for Delinquent Taxes was given and that there are other documents pertaining to the distraint and sale in addition to the existence of Annexes No. 7, 8, 9, 10, 11, and 12.

VII.

Admits Item No. 12.

VIII.

As to Item No. 13, the Assessor admits that the assessed valuations were made without reference to the mortgage encumbrances, but that the valuation was fixed in considering a similar ratio of similar properties assessed within Grant County taking into consideration the other items which would affect the value of the property.

/s/ By PAUL KLASSEN,

Prosecuting Attorney for Grant  
County, Washington.

Duly Verified.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed June 26, 1958.

[Title of District Court and Cause.]

**ANSWER OF FEDERAL NATIONAL  
MORTGAGE ASSOCIATION**

Comes now the Defendant Federal National Mortgage Association, by Heckendorn & McNair, its attorneys, and in Answer to the Notice and Complaint herein states and alleges as follows:

## I.

This Defendant does not have sufficient information as to the truth or falsity of the matters set forth in Plaintiff's Notice or of the allegations in Plaintiff's Complaint and, therefore, denies each and every such matter and allegation contained therein and demands strict proof thereof, except this Defendant admits that it has and claims a mortgage lien against certain property described in said Complaint and hereinafter set out, which mortgage lien is more particularly set forth and described in Defendant's Further and Separate Answer herein.

Further and Separate Answer of Federal National  
Mortgage Association

Comes now the Defendant Federal National Mortgage Association and for Further and Separate Answer to Plaintiff's Complaint [138] herein states and alleges as follows:

## I.

Defendant Federal National Mortgage Association is a corporation created pursuant to the provisions of Title III of an Act of Congress approved June 27th, 1934, known as the National Housing Act, as amended.

## II.

On or about November 18th, 1953, the Defendant Larsonaire Homes, Inc., a Washington corporation, for valuable consideration, did make, execute, and deliver to Securities Mortgage, Inc., a Washington corporation, its certain promissory note in writing

whereby it did promise and agree to pay to Securities Mortgage, Inc., or its order the principal sum of \$1,782,000 together with interest thereon from date until maturity at the rate of 4% per annum.

### III.

At the same time and as a part of the same transaction and for the purpose of securing payment of the promissory note, together with interest thereon as therein provided and the performance of all the covenants of the mortgage hereinafter referred to, the Defendant Larsonaire Homes, Inc., made, executed, and delivered to Securities Mortgage, Inc., a corporation, a mortgage upon all right, title, and interest of Larsonaire Homes, Inc., a Washington corporation, arising out of lease dated August 6, 1953, bearing Contract No. AF 45(617)-131, between the Secretary of the Air Force, representing the United States of America, and Larsonaire Homes, Inc., together with all tenements, hereditaments, appurtenances, apparatus, fixtures, and equipment located on that certain tract or parcel of land situate within the Larson Air Force Base, County of Grant, State of Washington, being more particularly described as follows:

Commencing at the Northeast corner of Section 5; [139] Township 19 North, Range 28 East, Willamette Meridian, and running thence South  $89^{\circ}39'40''$  West 1261.48 feet to the point of beginning of the parcel of land herein described; thence South  $89^{\circ}39'40''$  West 215.98 feet to a point; thence South  $40^{\circ}02'04''$  West 97.54 feet to a point; thence South

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29°29'57" East 1122.10 feet to a point; thence South 39°04'30" West 263.42 feet to a point; thence North 80°00'00" West 935.00 feet to a point; thence South 18°03'41" East 1107.13 feet to a point; thence North 71°56'19" East 2485.58 feet to a point; thence North 29°29'57" West, 1160 feet to a point; thence South 60°30'03" West 970.00 feet to a point; thence North 29°29'57" West 970.51 feet to the point of beginning, containing 58.39 acres of land, more or less;

and upon that certain parcel of land within the Larson Air Force Base, County of Grant, State of Washington, being a strip of land 60 feet wide and lying 30 feet on each side of the following described center line:

Commencing at the Northeast corner of Section 5, Township 19 North, Range 28 East, Willamette Meridian, and running thence South 89°39'40" West 2464.08 feet to a point being the intersection of said section line and the northeasterly boundary of the Ephrata-Moses Lake Highway right of way; thence along the northeasterly boundary of said right of way South 18°03'41" East, 1619.43 feet to the center line and point of beginning of the right of way herein described; thence North 80°48'00" East 33.56 feet to a point in the westerly boundary of the hereinabove described leased area;

and upon that certain parcel of land within the Larson Air Force Base, County of Grant and State of Washington, being a strip of land 10 feet wide and lying 5 feet on each side of the following described center line:



Commencing at the northeast corner of Section 5, Township 19 North, Range 28 East, Willamette Meridian, and running thence South  $89^{\circ}39'40''$  West 1421.80 feet to a point on the South boundary of the premises leased to Moses Lake Homes, Inc., said point being the center line and true point of beginning of the right of way herein described; thence North  $62^{\circ}27'53''$  East 162.00 feet to a point; thence North  $29^{\circ}29'57''$  West 1281.17 feet to a point on the northwesterly boundary of the premises leased to Moses Lake Homes, Inc., thence North  $29^{\circ}29'57''$  West 6.00 feet to a point; thence North  $62^{\circ}27'53''$  East 697.46 feet to a point; thence North  $01^{\circ}04'45''$  West 153.30 feet to a point.

#### IV.

The mortgage was duly acknowledged in the manner required by law, so as to entitle it to be filed for record, and it was [140] thereafter filed for record in the office of the Auditor of Grant County, Washington, on November 27th, 1953, and there duly recorded in Volume 72 of Mortgages at page 502, under Auditor's File No. 213022, and also filed as a chattel mortgage on November 27th, 1953, in said Auditor's office under Auditor's File No. 213023. For a particular description of the conditions and covenants of the mortgage reference is hereby made to it and to the record thereof and by this reference thereto the same is incorporated herein and made a part hereof as fully as though here set forth at length.

#### V.

On or about February 10th, 1955, Securities

Mortgage, Inc., did in writing duly assign, transfer, and endorse the note and mortgage and the obligation evidenced thereby, and all sums due or to become due thereon, and all rights of action thereon, to the Defendant Federal National Mortgage Association, which transfer is evidenced in part by the endorsement upon the promissory note and the written assignment of the mortgage now on file and of public record in the office of the Auditor of Grant County, Washington. Ever since that date Defendant Federal National Mortgage Association has been and now is the legal owner and holder of the note and mortgage for value, and in due course.

## VI.

As of June 1st, 1958, the unpaid balance due upon said note and mortgage from Larsonaire Homes, Inc., to Federal National Mortgage Association was \$1,691,920.22, and that there is also due on such note and mortgage interest on the unpaid principal balance accrued at the rate of 4% per annum from June 1, 1958. [141]

## Further and Separate Answer of Federal National Mortgage Association

Comes now the Defendant Federal National Mortgage Association and for further and separate Answer to Plaintiff's Complaint herein states and alleges as follows:

## I.

The Defendant Federal National Mortgage Association is a corporation created pursuant to the provisions of Title III of an Act of Congress approved

June 27th, 1934, known as the National Housing Act, as amended.

## II.

On or about September 20th, 1954, the Defendant Larson Heights, Inc., a Washington corporation, for valuable consideration, did make, execute, and deliver to Securities Mortgage, Inc., a Washington corporation, its certain promissory note in writing whereby it did promise and agree to pay to Securities Mortgage, Inc., or its order, the principal sum of \$1,626,300.00 together with interest thereon from date until maturity at the rate of  $4\frac{1}{2}\%$  per annum.

## III.

At the same time and as a part of the same transaction and for the purpose of securing payment of the promissory note, together with interest thereon as therein provided and the performance of all the covenants of the mortgage hereinafter referred to, the Defendant Larson Heights, Inc., made, executed, and delivered to Securities Mortgage, Inc., a corporation, a mortgage upon all right, title, and interest of Larson Heights, Inc., a Washington corporation, arising out of lease dated August 2d, 1954, bearing Contract No. AF 45(617)s-57, between the Secretary of the Air Force, representing the United States of America, and Larson Heights, Inc., together with all tenements, hereditaments, [142] appurtenances, apparatus, fixtures, and equipment located on that certain tract or parcel of land situate within Larson Air Force Base, County of Grant, State of Washington, being more particularly described as follows:

Commencing at the Southeast corner of the Northeast quarter of Section 5, Township 19 North, Range 28 East, Willamette Meridian, and running thence North  $00^{\circ}14'10''$  East 46.03 feet to the point of beginning of the parcel of land herein described; thence South  $71^{\circ}56'19''$  West 1483.39 feet to a point; thence North  $18^{\circ}03'41''$  West 1000.00 feet to a point; thence North  $71^{\circ}56'19''$  East 2485.58 feet to a point; thence South  $18^{\circ}03'41''$  East 1000 feet to a point; thence South  $71^{\circ}56'19''$  West 1002.19 feet to the point of beginning, containing 57.061 acres of land, more or less;

and upon that certain parcel of land situate within Larson Air Force Base, County of Grant, State of Washington, being a strip of land sixty feet wide and lying 30 feet on each side of the following described center Line;

Commencing at the Southeast corner of the Northeast quarter of Section 5, Township 19 North, Range 28 East, Willamette Meridian, and running thence North  $00^{\circ}14'10''$  East 46.03 feet to a point; thence South  $71^{\circ}56'19''$  West 1483.39 feet to a point; thence North  $18^{\circ}03'41''$  West 200.00 feet to the center line and the point of beginning of the right of way herein described; thence South  $71^{\circ}56'19''$  West 33.16 feet to a point on the northeasterly boundary of the Ephrata-Moses Lake Highway right of way.

#### IV.

The mortgage was duly acknowledged in the manner required by law, so as to entitle it to be filed for record, and it was thereafter filed for record in the

office of the Auditor of Grant County, Washington, on September 23d, 1954, and there duly recorded under Auditor's File No. 230239 and also filed as a chattel mortgage on September 23d, 1954, in the office of the County Auditor of Grant County, Washington, under Auditor's File No. 230241. Said mortgage was modified and re-recorded on September 21st, 1955, under Auditor's File No. 254814 and filed as a chattel mortgage on the same date under Auditor's File No. 230240, Vault Number 76806, and said mortgage was again modified [143] and re-recorded on September 30th, 1955, under Auditor's File No. 255407 and re-filed as a chattel mortgage under Auditor's File No. 230241. On November 16th, 1955, the parties to said mortgage executed a "Mortgage Correction and Modification Agreement" setting forth the modifications and corrections made in said mortgage and said correcting instrument was recorded November 21st, 1955, under Auditor's File No. 258842 and on said date was also filed as a chattel mortgage under Auditor's File Nos. 248843 and 258844 and filed with the original instrument in Vault No. 76806. For a particular description of the conditions and covenants of the mortgage reference is hereby made to it and to the record thereof and by this reference thereto the same is incorporated herein and made a part hereof as fully as though here set forth at length.

## V.

On or about December 9th, 1955, Securities Mortgage, Inc., did in writing duly assign, transfer, and

endorse the note and mortgage and the obligation evidenced thereby, and all sums due or to become due thereon, and all rights of action thereon, to the Defendant Federal National Mortgage Association, which transfer is evidenced in part by the endorsement upon the promissory note and the written assignment of the mortgage now on file and of public record in the office of the Auditor of Grant County, Washington, filed December 14th, 1955, under Auditor's File Nos. 260488 and 460449. Ever since December 9th, 1955, the Defendant Federal National Mortgage Association has been and now is the legal owner and holder of the note and mortgages for value, and in due course.

## VI.

As of June 1st, 1958, the unpaid balance due upon said note and mortgage from Larson Heights, Inc., to Federal National Mortgage Association was \$1,559,815.47, together with interest thereon accrued at the rate of  $4\frac{1}{2}\%$  per annum from June 1st, 1958.

Wherefore, the Defendant Federal National Mortgage Association prays that the Plaintiff be held to strict proof of the rights claimed in the Complaint and that the condemnation and taking prayed for by the Plaintiff herein expressly be held to be subject to the respective mortgages set forth as applying to the respective parcels of land and that the prior and paramount right of the Defendant Federal National Mortgage Association under such mortgages be in no way impaired but expressly be maintained and affirmed herein as first liens prior



in right and time as security for repayment of the respective loans set forth and that any and all interests of or to be acquired by the Plaintiff herein be subject to such prior liens.

/s/ C. HENRY HECKENDORN,  
For Heckendorn & McNair, Attorneys for Defendant Federal National Mortgage Association.

[Endorsed]: Filed July 1, 1958.

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[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW ON PETITION FOR ORDER  
DIRECTING PAYMENT OF MONEY

Defendants Moses Lake Homes, Inc., Larsonaire Homes, Inc. and Larson Heights, Inc., having petitioned the Court for an order directing payment to them of the estimated compensation in this case, and defendant Grant County having petitioned for the payment of said amount to it as taxes, and said petitions having regularly come on for hearing before the undersigned Court, defendants Moses Lake Homes, Inc., Larsonaire Homes, Inc. and Larson Heights, Inc. being represented by Josef Diamond and Lyle L. Iversen of Lyette, Diamond & Sylvester, and defendant Grant County being represented by Paul Klasen, Prosecuting Attorney of Grant County, Washington, and the Court having considered the Requests for Admissions and the responses thereto and the exhibits filed herein and the files and records in this cause and having heard the argu-

ments of counsel and being fully advised in the premises, hereby makes the following [146]

### Findings of Fact

#### I.

Defendants Moses Lake Homes, Inc., Larsonaire Homes, Inc. and Larson Heights, Inc. are, respectively, sponsors of Wherry housing projects on Larson Air Force Base pursuant to leases to them made by the Secretary of the Air Force under Title VIII of the National Housing Act. The interests of each of said defendants under their respective leases were taken by the United States under Declaration of Taking filed March 1, 1958, and the United States deposited in this Court a total aggregate amount of \$253,000 as estimated compensation to the said three defendants.

#### II.

Larson Air Force Base is located in Grant County, Washington, and Grant County has undertaken to assess taxes against the interests of said three defendants. Pursuant to the laws of the State of Washington, Grant County has listed for tax purposes the improvements placed upon the leased property on Larson Air Force Base by each of the respective defendants. With respect to Moses Lake Homes, Inc., the assessor of Grant County in June, 1954 listed said improvements for 1955 taxes. Thereafter in July, 1954, Grant County was restrained by the Superior Court of the State of Washington from levying or attempting to levy taxes against the property of said defendant and said restraining

order remained in effect until December of 1957 when the Supreme Court of the State of Washington set the injunction aside and held that defendant Moses Lake Homes, Inc.'s leasehold was taxable at the valuation of the improvements. Thereafter, defendant Grant County levied taxes on said property pursuant to the assessment previously made. Grant County also in 1957 listed the property of each of the defendants for the years 1956, 1957 and 1958 on detail lists of personal property as omitted property for those respective years pursuant to Section 84.40.080 of [147] the Revised Code of Washington, and the levy for the year 1955 was likewise made pursuant to the same section of the Revised Code of Washington. Said Section reads:

"The assessor, upon his own motion, or upon the application of any taxpayer, shall enter in the detail and assessment list of the current year any property shown to have been omitted from the assessment list of any preceding year, at the valuation of that year, or if not then valued, at such valuation as the assessor shall determine from the preceding year, and such valuation shall be stated in a separate line from the valuation of the current year. Where improvements have not been valued and assessed as a part of the real estate upon which the same may be located, as evidenced by the assessment rolls, they may be separately valued and assessed as omitted property under this section: Provided, That no such assessment shall be made for any period more than three years preceding the year in which

such improvements are valued and assessed: Provided, further, that no such assessment shall be made in any case where a bona fide purchaser, encumbrancer, or contract buyer has acquired any interest in said property prior to the time such improvements are assessed. When such an omitted assessment is made, the taxes levied thereon may be paid within one year of the due date of the taxes for the year in which the assessment is made without penalty or interest."

\*Tax claims of Grant County against Moses Lake Homes, Inc. are as follows: 1955, \$21,150; 1956, \$32,925; 1957, \$31,330; 1958, \$22,575. Grant County in 1957 pursuant to the statute of the State of Washington with reference to omitted property also assessed Larsonaire Homes, Inc. for 1956 and 1957 taxes and assessed Larson Heights, Inc. for 1957 taxes. In addition, Grant County sought to levy taxes against each of the sponsors for 1958 and 1959.

### III.

By the laws of the State of Washington, taxes do not become a lien until after they have been assessed and levied. The levy for the year 1959 will not occur until October of 1958. Levies for each of the other years did not occur until after the property was listed during the year 1957 pursuant to the Revised Code of Washington, Section 84.40.080, or; in the case of the 1955 taxes against Moses Lake Homes, Inc., until the levy was made following the reversal of [148] the decision of the Superior Court

by the Supreme Court of Washington in December of 1957. None of said taxes became a lien upon the properties of defendant sponsors until a time subsequent to June 15, 1956. With respect to 1955 and 1956 taxes assessed against Moses Lake Home, Inc., the taxes would have been assessed and levied prior to June 15, 1956, except for the injunction.

#### IV.

The State of Washington by statute, Section 84.40.030 of the Revised Code of Washington, provides that taxable leasehold estates shall be valued at such price as they would bring at a fair, voluntary sale for cash. The Supreme Court of the State of Washington has held with respect to leaseholds other than Wherry housing project leaseholds that in valuing the leasehold for taxation purposes it must be measured by its market value considered in the light of its burdens and benefits. *Metropolitan Building Co. v. King County*, 72 Wash., 47; 192 Pac., 887. *Metropolitan Building Co. v. King County*, 62 Wash., 409. *In Re Metropolitan Building Co.*—144 Wash., 469; 258 Pac., 473. The State of Washington has followed a different method of evaluating Wherry housing projects for taxation purposes by decision of its Supreme Court. In the case of *Moses Lake Homes, Inc. v. Grant County*—151 Wash., Dec., 254; whereby the Supreme Court held that with respect to Wherry housing project leases the value of the leasehold interest in the full value of the buildings and improvements. By the laws of the State of Washington as declared by its

Supreme Court, taxes and assessments on Wherry housing projects are thus levied upon a basis different and higher than the amount of taxes and assessments on other similar property of similar value.

V.

The Secretary of the Air Force, through his delegated representative, George S. Robinson, deputy special assistant for installations, on the 4th day of September, 1957, made a determination pursuant to Section 408 of the Housing Amendments of 1955 by which it was determined that \$111,358.65 was the amount equal to payments made by the federal government to local taxing and other agencies involved with respect to such property, plus such amount as may be appropriate for expenditures made by the federal government or the lessee for the provision or maintenance of streets, roads, sidewalks, curbs, gutters, water and sewer systems, fire lanes and hydrants, playgrounds, street lighting, fire protection, garbage disposal, snow removal and sewer service or any other service or facilities which are customarily provided by the state, county, city or other local taxing authority with respect to other similar property of similar value. Grant County in making its assessment of taxes against these sponsor defendants did not give any credit or consideration to said determination by the representative of the Secretary of the Air Force.

From the Foregoing Findings of Fact, the Court Makes the Following:



Conclusions of Law

I.

None of the taxes claimed by Grant County became a lien prior to June 15, 1956, the date mentioned in the Act of August 7, 1956, 42 USCA, 1594, Note, but taxes for 1956 and 1957 with respect to Moses Lake Homes, Inc., would have become a lien prior to said date except for an injunction as to their assessment and levy and with respect thereto taxes for 1955 and 1956 in [150] the respective amounts of \$21,150 and \$32,925 are not subject to said Act of August 7, 1956.

Grant County failed to meet the conditions prescribed by Congress in the Act of August 7, 1956, 42 USCA, 1594, Note, in that it failed to give credit to the defendant sponsors for the amounts determined by the designee of the Secretary of Defense to be equal to payments made by the federal government to the local taxing or other public agencies involved with respect to such property, plus such amount as may be appropriate for any expenditures made by the federal government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, sliding snow removal or any other services or facilities which are customarily provided by the State, county, city or other local taxing authority with respect to any other such property.

III.

The taxes assessed by Grant County do not meet the requirements for the permission of Congress.

contained in the Act of August 7, 1956, 42 USCA, 1594, Note, in that they exceed the amount of taxes or assessments on other similar property of similar value. Said act does not apply to taxes assessed against Moses Lake Homes, Inc., for 1955 and 1956.

#### IV.

Taxes for 1959 had not become a lien upon the property of defendant sponsors prior to the time of the Declaration of Taking on March 1, 1958, and are not a claim against the deposit in Court.

#### V.

Grant County has no valid claim against the deposit of estimated compensation in this case, except as to Moses Lake Homes, Inc., as to which defendant it is entitled to payment [151] from the deposit of estimated compensation in the sum of \$21,150 for 1955 taxes and \$32,925 for 1956 taxes with interest thereon at 6% from February 15, 1958.

#### VI.

Defendants Moses Lake Homes, Inc., Larsonaire Homes, Inc. and Larson Heights, Inc., are entitled to an order directing the payment to them of the amounts deposited in Court as estimated compensation for the taking of their respective interests, less with respect to Moses Lake Homes, Inc., the amount due Grant County by the preceding paragraph.

#### VII.

There is no just reason for delay in the entry of judgment for the payment to Moses Lake Homes, Inc., Larsonaire Homes, Inc., Larson Heights, Inc.,

and Grant County of the amount of estimated compensation and the same is a claim distinct from the issues to be determined in fixing final compensation and judgment should be entered pursuant to Rule 54B of the Rules of Civil Procedure at this time for the payment of said estimated compensation to said defendants.

Done in open Court this 3rd day of July, 1958.

/s/ SAM M. DRIVER,  
District Judge.

Presented by:

LYCETTE, DIAMOND &  
SYLVESTER,

/s/ By LYLE L. IVERSEN,

Attorneys for Moses Lake Homes, Inc., Larsonaire  
Homes, Inc. and Larson Heights, Inc. [152]

[Endorsed]: Filed July 3, 1958.

United States District Court, For the Eastern  
District of Washington, Northern Division

Civil Action No. 1667

UNITED STATES OF AMERICA, Plaintiff,

vs.

CERTAIN INTERESTS IN PROPERTY IN  
GRANT COUNTY, WASHINGTON; MOSES  
LAKE HOMES, INC., a Washington corpora-  
tion, LARSONAIRE HOMES, INC., a Wash-  
ington corporation, LARSON HEIGHTS,  
INC., a Washington corporation, THE NA-  
TIONAL BANK OF COMMERCE OF  
SEATTLE, a corporation, SECURITIES  
MORTGAGE, INC., a Washington corpora-  
tion, INSTITUTIONAL SECURITIES COR-  
PORATION, NEW YORK TRUST COM-  
PANY, FEDERAL NATIONAL MORT-  
GAGE ASSOCIATION, GRANT COUNTY,  
WASHINGTON, a municipal corporation,  
UNKNOWN OWNERS, Defendants.

### JUDGMENT FOR PAYMENT OF ESTIMATED COMPENSATION

The United States, having deposited in Court the sum of \$253,000 as the aggregate amount of estimated compensation for the taking of the respective interests of Moses Lake Homes, Inc., Larsonaire Homes, Inc. and Larson Heights, Inc., and Moses Lake Homes, Inc. having petitioned for the payment to it in the sum of \$122,400 with respect to Parcels 1, 2, 3 and 4 and \$4100 with respect to Par-

cel 7, and Larson Heights, Inc. having petitioned for the payment to it of \$61,200 with respect to Parcels 8 and 9, and defendant Larsonaire Homes, Inc. having petitioned for payment to it of the sum of \$61,200 with respect to Parcels 5 and 6, and \$4100 with respect to Parcel 7, and said petitions having regularly come on for hearing, together with a petition of Grant County for the payment to it of taxes from the sums deposited, and the Court having heard said matter on the 26th day of June, 1958, defendants Moses Lake Homes, Inc., Larsonaire Homes, Inc. and Larson Heights, Inc. [153] being represented by Josef Diamond and Lyle L. Iversen, of the firm of Lycette, Diamond & Sylvester, and defendant Grant County, being represented by Mr. Paul. Klasen, Prosecuting Attorney of Grant County, and the Court having considered the evidence and the arguments of counsel and having made Findings of Fact and Conclusions of Law and having determined that this is a proper matter in which to issue a judgment upon this claim without awaiting a final judgment with respect to total compensation due as prescribed in Rule 54B of the Rules of Civil Procedure, and the Court being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed that the Clerk is authorized and directed to pay from the estimated compensation deposited in this Court to Moses Lake Homes, Inc. for Parcels 1, 2 3 and 4 the sum of \$122,400, and with respect to Parcel 7 the sum of \$4100, less the amounts hereinafter allowed to Grant County and to pay to Larson Heights, Inc.,

with respect to Parcels 8 and 9 the sum of \$61,200, and to pay to Larsonaire Homes, Inc., with respect to Parcels 4 and 5 the sum of \$61,200, and with respect to Parcel 7 the sum of \$4100. It is further

Ordered, Adjudged and Decreed that there is no just reason for delay in the entry of judgment for the payment of the amount of estimated compensation to the petitioners therefor and the same is a claim distinct from the issues to be determined in fixing final compensation and judgment on these issues is hereby entered pursuant to Rule 54B of the Rules of Civil Procedure. It is further

Ordered, Adjudged and Decreed that the claim of Grant County against the amount of the estimated compensation is hereby denied, except that its claim against the estimated compensation due Moses Lake Homes, Inc., is allowed in the sum of \$21,150 for 1955 [154] taxes and in the sum of \$32,925 for 1956 taxes together with interest at 6% from February 15, 1958, and the Clerk is authorized and directed to pay said amount to Grant County. The Clerk shall not disburse said amounts until the further order of the Court.

/s/ SAM M. DRIVER,  
District Judge.

Presented by:

LYCETTE, DIAMOND &  
SYLVESTER,

/s/ By LYLE L. IVERSEN,

Attorneys for Moses Lake Homes, Inc., Larsonaire Homes, Inc. and Larson Heights, Inc. [155]

[Endorsed]: Filed July 3, 1958.



[Title of District Court and Cause.]

**APPEARANCE**

To: Plaintiff Above Named and Its Attorney, William B. Bantz and to Lyle Iversen.

Grant County, Washington, a municipal corporation, one of the defendants above-named, hereby enters its appearance by the undersigned attorney as Special Counsel.

Dated this 10th day of July, 1958.

/s/ JENNINGS P. FELIX,  
Special Counsel for Grant  
County. [156]

Affidavit of Service by Mail Attached. [157]

[Endorsed]: Filed July 11, 1958.

[Title of District Court and Cause.]

**MOTION FOR AMENDMENT AND FOR ADDITIONAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT**

Comes now the defendant Grant County, by and through its Counsel of Record herein, pursuant to Rules 52 and 59 of the Federal Rules of Civil Procedure and moves the Court for the inclusion and amendment of the Findings of Fact, Conclusions of Law and Judgment as proposed by defendant Grant County and as attached hereto and made a part hereof as if set forth in full.

Dated this 11th day of July, 1958.

/s/ JENNINGS P. FELIX,  
Special Counsel for Grant  
County. [158]

[Endorsed]: Filed July 14, 1958.

[Title of District Court and Cause.]

**PROPOSED AMENDED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW ON PETI-  
TIONS FOR ORDER DIRECTING PAY-  
MENT OF MONEY**

Defendants Moses Lake Homes, Inc., Larsonaire Homes, Inc., Larson Heights, Inc., and Grant County, Washington, each having petitioned the Court for an order directing payment to them of the estimated compensation in this case, and said petitions having regularly come on for hearing before the undersigned Court, by and through the respective Counsel of Record for said petitioners, and the Court having considered the Requests for Admissions and the responses thereto and the exhibits filed herein and the files and records in this cause and having heard the arguments of counsel and being fully advised in the premises, hereby makes the following:

**Amended Findings of Fact**

**I.**

Defendants Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., are lessees

of certain lands owned by the United States and located within Grant County, Washington and over which there is concurrent jurisdiction. [159]

Pursuant to Title VIII of the National Housing Act, commonly known as the Wherry Housing Act, said defendants constructed and operated housing projects on said lands. All interests in said leases and all personal property owned by the said lessees are encumbered by private mortgage as follows:

Petitioner: Moses Lake Homes, Inc. Lease Date: May 31, 1950. Mortgagee: National Bank of Commerce.

Petitioner: Larsonaire Homes, Inc. Lease Date: Aug. 6, 1953. Mortgagee: Securities Mortgage, Inc.

Petitioner: Larson Heights, Inc. Lease Date: Aug. 2, 1954. Mortgagee: Securities Mortgage, Inc.

Said mortgages are insured by the Federal Housing Authority.

## II.

Moses Lake Homes, Inc., commenced construction of its project on or about May 1, 1950, and construction was completed on or about December 1, 1951. There is no evidence in the record as to the construction dates of Larsonaire Homes, and of Larson Heights, but all said properties became subject to Grant County taxes the first assessment date following the commencement of construction.

## III.

In 1952, Grant County assessed Moses Lake Homes, Inc., improvements as "improvements upon land the fee of which is in the United States" for

1953 taxes. That corporation thereupon brought suit to enjoin Grant County from the assessment or levy of taxes for 1953 and for subsequent years. The injunction was denied and Moses Lake Homes, Inc., appealed to the Supreme Court of the State of Washington in Appeal No. 32442, but withdrew its appeal prior to argument and the Judgment denying the injunctions [160] was affirmed on Remittitur.

#### IV.

Following the withdrawal of the Appeal, Grant County assessed the Moses Lake housing project in 1954 for 1955 taxes, again assessing the "improvements on lands the fee of which is in the United States. Moses Lake Homes, Inc., again brought suit to enjoin Grant County from assessing or levying taxes for 1955 and for subsequent years. An injunction was granted by the Grant County Superior Court which remained in effect until December 18, 1957, when the Remittitur of the Supreme Court of the State of Washington was filed with the Clerk of Grant County. The Supreme Court of the State of Washington held that the taxes, as assessed were valid in 151 Wash. Dec. 254.

#### V.

On January 3, 1957, Grant County assessed taxes against Larsonaire Homes, Inc., and Larson Heights, Inc., in a manner identical to that which was done in the Moses Lake Homes matter but as for property omitted from taxation for previous years.

The taxes assessed against said corporations were as follows:

Larsonaire Homes, Inc.

1956 taxes ..... \$21,750

1957 taxes ..... 18,798

Total ..... \$40,548

Larson Heights, Inc.

1957 taxes ..... \$18,706

At the instance of the respective corporations on September 19, 1957, the Grant County Superior Court wrongfully enjoined the assessment and levy of said taxes in Grant County Cause Numbers 10683 and 10682. [161]

## VI.

Following the decision of the Supreme Court of the State of Washington in *Moses Lake Homes, Inc. v. Grant County*, the injunctions in all cases were dissolved and Grant County assessed Moses Lake Homes, Inc., as follows:

| Assessment Year | Date Tax Payable      | Amount      | Interest to Mar. 1, 1958 |
|-----------------|-----------------------|-------------|--------------------------|
| 1954            | Prior to Ap. 30, 1955 | \$21,150.00 | \$ 4,798.72              |
| 1955            | Prior to Ap. 30, 1956 | 32,925.00   | 4,836.35                 |
| 1956            | Prior to Ap. 30, 1957 | 31,330.00   | 2,095.66                 |
|                 |                       | <hr/>       | <hr/>                    |
| Total           |                       | \$85,405.00 | \$11,730.73              |
|                 |                       |             | <hr/> \$97,135.73        |

## VII.

On January 21, 1958, the Grant County Treasurer distrained the interests of the various cor-

porate defendants for taxes as set forth above, and the date of sale was set for March 4, 1958.

### VIII.

On March 1, 1958, the United States commenced this action to condemn all outstanding interests in the leased lands and the leases, subject to the mortgages and filed a Declaration of Taking and deposited the sum of \$253,000 in the registry of this Court. The distraint sales were continued and the Court enjoined said sales on March 12, 1958.

### IX.

Thereafter, Moses Lake Homes, Larsonaire Homes, Inc., and Larson Heights, Inc., respectively filed claims against the deposit as follows:

|                             |              |
|-----------------------------|--------------|
| Moses Lake Homes, Inc. .... | \$126,500.00 |
| Larsonaire Homes, Inc. .... | 65,300.00    |
| Larson Heights, Inc. ....   | 61,200.00    |

|             |              |
|-------------|--------------|
| Total ..... | \$253,000.00 |
|-------------|--------------|

Moses Lake Homes, Inc., claimed a lessee's interest in Parcels 1, 2, 3, 4 and  $\frac{1}{2}$  of 5 of Schedule A for a value of \$126,500.

Larsonaire Homes, Inc., claimed a like interest in Parcels 5, 6 and  $\frac{1}{2}$  of 7 for a value of \$65,300.

Larson Heights, Inc., claimed a like interest in Parcels 8 and 9 for a value of \$61,200.

### X.

Moses Lake Homes, Inc., claims a lessee's in-



terest in  $\frac{1}{2}$  of parcel 5 and Larsonaire Homes, Inc., claims a like interest in the full value of said parcel. Larsonaire Homes, Inc., claims a like interest in  $\frac{1}{2}$  of parcel 7. There is no claim, save Grant County's, to the value of the other one-half interest in Parcel 7 amounting to \$4,100. The United States took possession of all said property on April 1, 1958.

### XI.

Grant County petitioned for disbursement of the money as follows:

|                          | Tax year | Tax          | Interest to<br>March 1, 1958 |
|--------------------------|----------|--------------|------------------------------|
| Moses Lake Homes, Inc.   | 1955     | \$ 21,150.00 | \$ 4,798.72                  |
|                          | 1956     | 32,925.00    | 4,836.35                     |
|                          | 1957     | 31,330.00    | 2,095.66                     |
|                          | 1958     | 22,575.00    |                              |
|                          | 1959     | 22,575.00    |                              |
| Larsonaire Homes, Inc.   | 1956     | 21,750.00    |                              |
|                          | 1957     | 18,798.00    |                              |
|                          | 1958     | 14,145.00    |                              |
|                          | 1959     | 14,145.00    |                              |
|                          | 1957     | 18,798.00    |                              |
| Larson Heights, Inc.     | 1958     | 14,145.00    |                              |
|                          | 1959     | 14,145.00    |                              |
|                          | 1957     | 18,798.00    |                              |
| Total                    |          | \$246,481.00 | \$11,730.73                  |
| Total Taxes and Interest |          |              | \$258,211.73                 |

### XII.

On September 4, 1957, the Secretary of the Air Force, through his delegated representative, George S. Robinson, deputy special assistant for installations, pursuant to Section 408 of the Housing Amendments of 1955, determined that \$111,358.65

was made in expenditures by the federal government or the lessees for the provision or maintenance of streets, roads, sidewalks, curbs, gutters, water and sewer systems, fire lines and hydrants, playgrounds, street lighting, fire protection, garbage disposal, snow removal and sewer service or any other service or facilities which are customarily provided by the State, County, City or other local taxing authority with respect to other similar property of similar value. This determination was delivered to Grant County through its Assessor on September 19, 1957, and was for the purpose of offsetting these amounts against applicable Grant County taxes.

### XIII.

The determination was for purposes of offset against the taxes payable in 1956 but it fails to segregate expenditures made before or after June 15, 1956, the effective date of Section 551 of the Housing Act of 1956. The determination further fails to distinguish which of the aforesaid corporations made the expenditures and in which years. Further, there is nothing in [164] this record to show that this determination is applicable to all or any of these corporations, these housing projects, or to Grant County. Further, the great majority of the expenditures were made prior to June 15, 1956.

### XIV.

Except for schools, Grant County taxes do not provide the services listed in said determination. Such services are provided by local improvement

assessments and city taxes over and above the amounts levied by Grant County. Grant County, in computing its county tax claims made no allowance for offsetting all or any portion of said determination.

From the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

I.

By the laws of the State of Washington, taxes do not become a lien until after they have been assessed and levied. The levy for the year 1959 will not occur until October of 1958. Levies for each of the other years did not occur until after the property was listed during the year 1957 pursuant to the Revised Code of Washington, Section 84.40.080, or, in the case of the 1955 taxes against Moses Lake Homes, Inc., until the levy was made following the reversal of the decision of the Superior Court by the Supreme Court of Washington in December of 1957. None of said taxes became a lien upon the properties of defendant corporate lessees until a time subsequent to June 15, 1956, but 1955 and 1956 taxes with respect to defendant Moses Lake Homes, Inc., would have become a lien prior to said date except for the [165] wrongful injunction sought and obtained by said defendant. With respect to said taxes for 1955 and 1956, the tax amounts of \$21,150 and \$32,925 are not subject to the Act of August 7, 1956.

## II.

The State of Washington by statute, Section 84.40.030 of the Revised Code of Washington, provides that taxable leasehold estates shall be valued at such price as they would bring at a fair, voluntary sale for cash. The Supreme Court of the State of Washington has held with respect to leaseholds other than Wherry housing project leaseholds that in valuing the leasehold for taxation purposes it must be measured by its market value considered in the light of its burdens and benefits. *Metropolitan Building Co. vs. King County*, 72 Wash. 47, 192 Pac. 887. *Metropolitan Building Co. vs. King County*, 62 Wash. 409. *In Re Metropolitan Building Co.* 144 Wash. 469, 258 Pac. 473. The State of Washington has followed a different method of evaluating Wherry housing projects for taxation purposes by decision of its Supreme Court. In the case of *Moses Lake Homes, Inc. vs. Grant County*, 151 Wash. Dec. 254, whereby the Supreme Court held that with respect to Wherry housing project leases the value of the leasehold interest is the full value of the buildings and improvements. By the laws of the State of Washington as declared by its Supreme Court, taxes and assessments on Wherry housing projects exceed the amount of taxes and assessments on other similar property of similar value. The taxes assessed by Grant County do not meet the requirements for the permission of Congress contained in the Act of August 7, 1956, 42 USCA 1594, Note, in that they exceed the amount of taxes or assessments on other similar

property of [166] similar value. Said Act does not apply to taxes assessed against Moses Lake Homes, Inc., for years 1955 and 1956.

### III.

Taxes for 1959 had not become a lien upon the property of defendant sponsors prior to the time of the Declaration of Taking on March 1, 1958, and are not a claim against the deposit in Court. The distraints by the County Treasurer did not have the effect of imposing liens upon the property distrained and are not a claim against the deposit in this Court.

### IV.

Grant County failed to meet the conditions prescribed by Congress in the Act of August 7, 1956, 42 USCA 1594, Note, in that it failed to give credit to the defendant lessees for the amounts determined by the designee of the Secretary of Defense to be equal to payments made by the federal government to the local taxing or other public agencies involved with respect to such property, plus such amount as may be appropriate for any expenditures made by the federal government to the local taxing or other public agencies involved with respect to such property, plus such amount as may be appropriate for any expenditures made by the federal government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, sliding snow removal or any other facilities or services which are customarily provided by the State, County, City or other local taxing authority—with respect to such other similar property.

## V.

Grant County has no valid claim against the deposit of estimated compensation in this case, except as to Moses Lake [167] Homes, Inc., as to which defendant it is entitled to payment from said deposit in the sum of \$21,150 for 1955 taxes and \$32,925 for 1956 taxes, with interest thereon at 6% per annum from February 15, 1958.

## VI.

Grant County has no right or power to levy taxes against any of the condemned property in the future, said property being owned by the United States and Congress not having given its consent to the taxation thereof. Because of said condemnation, the consent to tax, subject to offset, granted by Section 511 of the Act of August 7, 1956, amending Section 408 of the Housing Amendments of 1955 to Title VIII of the National Housing Act, is not applicable.

## VII.

Defendants Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., are entitled to an order directing the payment to them of the amounts deposited in the Court as estimated compensation for the taking of their respective interests less, with respect to Moses Lake Homes, Inc., the amount due Grant County by the preceding paragraph.

## VIII.

There is no just reason for delay in the entry of Judgment for the payment to Moses Lake Homes,



Inc., Larsonaire Homes, Inc., Larson Heights, Inc., and Grant County of the amount of estimated compensation and the same is a claim distinct from the issues to be determined in fixing final compensation and judgment should be entered pursuant to Rule 54B of the Rules of [168] Civil Procedure at this time for the payment of said estimated compensation to said defendants.

Done In Open Court this .. day of....., 1958.

.....,  
District Judge.

Presented by:

/s/ JENNINGS P. FELIX,

Special Counsel for Grant County.

[Title of District Court and Cause.]

**PROPOSED AMENDED JUDGMENT FOR  
PAYMENT OF ESTIMATED COMPENSA-  
TION**

The United States, having deposited in Court the sum of \$253,000 as the aggregate amount of estimated compensation for the taking of the respective interests of Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., and Moses Lake Homes, Inc., having petitioned for the payment to it in the sum of \$122,400 with respect to Parcels 1, 2, 3 and 4 and \$4,100 with respect to one-half of Parcel 5, and defendant Larsonaire Homes, Inc., having petitioned for payment to it of

the sum of \$61,200 with respect to Parcels 5 and 6 and \$4,100 with respect to one-half of Parcel 7, and Larson Heights, Inc., having petitioned for payment to it of \$61,200 with respect to Parcels 8 and 9, and said petitions having regularly come on for hearing, together with a petition of Grant County for the payment to it of taxes from the sums deposited, and the Court having heard said matter on the 26th day of June, 1958, the parties being represented by their respective counsel of record, and the Court having considered the evidence and the arguments of counsel and having made Findings of [170] Fact and Conclusions of Law and having determined that this is a proper matter in which to issue a judgment upon this claim without awaiting a final judgment with respect to total compensation due as prescribed in Rule 54B of the Rules of Civil Procedure, and the Court being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed

(1) That the Clerk is authorized and directed to pay to an escrow holder as heretofore agreed by the parties and approved by the Court, the estimated compensation deposited in this Court;

(2) That against said fund, Moses Lake Homes, Inc., shall have judgment for Parcels 1, 2, 3 and 4 of Schedule A, the sum of \$68,325;

(3) That against said fund Grant County shall have judgment for \$54,075 relative to Parcels 1,

2, 3 and 4 and \$4,100 with respect to one-half of Parcel 7, all of schedule A;

(4) That against said fund Larsonaire Homes, Inc., shall have judgment for \$61,200 with respect to Parcels 4 and 5 and \$4,100 with respect to its one-half interest in Parcel 7, all of schedule A;

(5) That against said fund Larson Heights, Inc., shall have judgment for \$61,200 with respect to Parcels 8 and 9 of Schedule A;

(6) That the claims of Grant County, except as provided herein, be and hereby are denied.

Done In Open Court this .. day of .., 1958.

.....  
District Judge. [171]

Presented by:

/s/ JENNINGS P. FELIX,  
Special Counsel for Grant County.

[Title of District Court and Cause.]

**MOTION FOR NEW TRIAL OR IN THE AL-  
TERNATIVE, FOR THE TAKING OF AD-  
DITIONAL EVIDENCE**

Comes Now the defendant, Grant County, Wash-  
ington, by and through its Counsel of record herein,  
pursuant to Rule 59 of the Federal Rules of Civil  
Procedure, and moves the Court for a New Trial,

or in the alternative the taking of additional evidence, and in support thereof sets forth and alleges as follows:

There is insufficient evidence before this Court upon which the Court can base a decision and for this reason, an Appeal to the Court of Appeals for the Ninth Circuit will likely result in a remand of the cause to this Court. Said evidence is insufficient in the following respects:

1. The determination of the Secretary of the Air Force is not shown to be applicable to Grant County or to the corporate defendants and speaks only of certain F.H.A. numbers; and

2. The said determination does not prescribe which expenditures have been made by which lessee corporation or by the United States or for what years, or in what years, and is therefore insufficient to be a determination as required by Section 511 of the Act of August 7, 1956; [174]

3. This element of the burden of proof is upon the corporate claimants against the fund.

4. The existing Judgment of this Court grants Judgment to Moses Lake Homes, Inc., different than that which is claimed in its petition in that said petition claims a one-half interest in Parcel 5 and no interest in Parcel 7 and the Judgment grants no interest in Parcel 5 and a one-half interest in Parcel 7.

5. In line with the determination of the Secre-

tary of the Air Force, the record should disclose what services are provided by Grant County out of the tax funds being offset and in what amounts.

6. This motion is not directed primarily to ask the Court to change its decision on the merits but to complete an incomplete record.

Respectfully submitted this 11th day of July, 1958.

FELIX & ABEL and  
PAUL KLASSEN,

/s/ By JENNINGS P. FELIX,  
Of Counsel for Grant County.

[Endorsed]: Filed July 14, 1958.

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[Title of District Court and Cause.]

**ORDER DENYING MOTION FOR NEW TRIAL  
OR, IN THE ALTERNATIVE, FOR THE  
TAKING OF ADDITIONAL EVIDENCE**

The above named defendant Grant County, Washington, pursuant to Rule 59 of the Rules of Civil Procedure, has filed herein its motion for a new trial, or, in the alternative, for the taking of additional evidence; and the Court has considered said motion and is fully advised in the premises.

It Is Now, Therefore, Ordered that the motion of defendant Grant County, Washington for a new trial, or, in the alternative, for the taking of additional evidence, is hereby denied.

Dated this 23rd day of July, 1958.

/s/ SAM M. DRIVER,

United States District Judge.

[Endorsed]: Filed July 23, 1958.

[Title of District Court and Cause.]

**ORDER DENYING MOTION FOR AMEND-  
MENT AND FOR ADDITIONAL FIND-  
INGS OF FACT, CONCLUSIONS OF LAW,  
AND JUDGMENT**

The above named defendant Grant County, Wash-  
ington, pursuant to Rules 52 and 59 of the Rules  
of Civil Procedure, has filed herein its motion for  
amendment of and additions to the findings of fact,  
conclusions of law, and judgment, heretofore en-  
tered by this Court in the above entitled cause on  
July 3, 1958, and the Court has considered the mo-  
tion and is fully advised in the premises.

It Is Now, Therefore, Ordered that the motion  
of defendant Grant County, Washington, for  
amendment of and additions to the Findings of  
Fact, Conclusions of Law, and Judgment, hereto-  
fore entered in the above entitled cause, is hereby  
Denied.

Dated this 23rd day of July, 1958.

/s/ SAM M. DRIVER,

United States District Judge.

[Endorsed]: Filed July 23, 1958.



[Title of District Court and Cause.]

**MOTION FOR DISBURSEMENT OF  
ESTIMATED COMPENSATION**

Defendants, Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., hereby petition for an order of the Court directing disbursement by the Clerk of estimated compensation in accordance with the judgment for payment of estimated compensation docketed herein on July 7, 1958.

This motion is made for the reason that no good purpose will be served by withholding at this time the disbursement of the money and is based upon all the files and records herein, and the judgment for payment of estimated compensation docketed on July 7, 1958.

**LYCETTE, DIAMOND &  
SYLVESTER,**

/s/ By **LYLE L. IVERSEN,**  
Attorneys for Moses Lakes Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed July 25, 1958.

[Title of District Court and Cause.]

ORDER DIRECTING PAYMENT  
OF FUNDS

Judgment for payment of estimated compensation having heretofore been entered on the 7th day of July, 1958, with the provision that disbursement would not be made until the further order of the Court and Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., having petitioned for disbursement of the money, and the Court being fully advised in the premises, it is hereby

Ordered that the Clerk is directed to disburse the deposit of estimated compensation in accordance with the judgment for payment of estimated compensation heretofore entered.

Done In Open Court this 28th day of July, 1958.

/s/ SAM M. DRIVER,  
District Judge.

Presented by:

LYCETTE DIAMOND &  
SYLVESTER,

/s/ By LYLE L. IVERSEN,

Attorneys for Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed July 28, 1958.

[Title of District Court and Cause.]

**NOTICE OF APPEAL**

Notice Is Hereby Given that Moses Lake Homes, Inc., one of the defendants above-named hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment for payment of estimated compensation entered in this action on the 7th day of July, 1958. This appeal is from so much of said judgment as allows to Grant County a claim against the estimated compensation in the sum of Twenty-one Thousand One Hundred Fifty Dollars (\$21,150.00) for 1955 taxes, and in the sum of Thirty-two Thousand One Hundred Twenty-five Dollars (\$32,125.00) for 1956 taxes, together with interest at six percent (6%) from February 15, 1958.

**LYCETTE, DIAMOND &  
-SYLVESTER,**

/s/ By **LYLE L. IVERSEN,**

**Attorneys for Appellant Moses  
Lake Homes, Inc. [180]**

[Endorsed]: Filed August 4, 1958.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given pursuant to the Rules of Federal Practice and Procedure that Grant County, Washington, defendant above named, does hereby Appeal and Cross-Appeal to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on July 7, 1958, and each and every part thereof, and from the Order Denying the Motion for Amendment and for Additional Findings of Fact, Conclusions of Law and Judgment entered July 23, 1958, and from the Order Denying New Trial, or In The Alternative for the Taking of Additional Evidence entered on July 23, 1958, and from the Order for Disbursement of Funds entered in this action on July 28, 1958, and from each and every part thereof.

FELIX & ABEL and  
PAUL A. KLASSEN, JR.,  
Prosecuting Attorney,  
Grant County,

/s/ By JENNINGS P. FELIX,  
Attorneys for Grant County.

[Endorsed]: Filed August 11, 1958.

[Title of District Court and Cause.]

**MOTION TO ORDER REPAYMENT OF  
FUNDS INTO REGISTRY OF COURT**

Defendants, Grant County, Washington, hereby petition for an Order of the Court directing funds heretofore disbursed to Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., be repaid into the registry of the Court.

This Motion is made for the reason that the disbursement by the Clerk of Court was in error as being prior to the expiration of ten days after the entry of the order of disbursement as required by Rule 62(a) and to permit the supersedeas bond to be filed so that disbursement will be stayed until the decision of the Court on appeal.

Dated this 8th day of August, 1958.

**FELIX & ABEL and  
PAUL A. KLASSEN, JR.,**  
Prosecuting Attorney,  
Grant County,

/s/ By **JENNINGS P. FELIX,**  
Attorneys for Grant County.

[Endorsed]: Filed August 11, 1958.

[Title of District Court and Cause.]

**MOTION TO APPROVE SUPERSEDEAS  
BOND ON APPEAL OF GRANT COUNTY,  
WASHINGTON OR IN ALTERNATIVE  
SET THE BOND**

Defendants move the Court that its supersedeas bond in the amount of \$15,000 conditioned upon satisfaction of the Judgment with costs, interest and damages for delay, be approved.

The supersedeas bond asks a stay pursuant to Rule 64 and other applicable rules of the disbursement of a total of \$194,464.97 to Moses Lake Homes, Inc., Larson Heights, Inc., and Larsonaire Homes, Inc., and that the monies be replaced and retained in the registry of the Court until the final Judgment on Appeal.

The bond of \$15,000 amount is set to cover 6% interest for one year or \$11,667.82 plus all reasonable foreseeable costs on appeal.

In the alternative, petitioner asks that the Court set the amount of the supersedeas bond necessary to require said funds to be replaced and retained in the registry of the Court.

Dated this 8th day of August, 1958.

**FELIX & ABEL and  
PAUL A. KLASSEN, JR.,  
Prosecuting Attorney,  
Grant County,**

/s/ By **JENNINGS P. FELIX,  
Of Counsel for Petitioners.**

[Endorsed]: Filed August 11, 1958.



CLERK'S JOURNAL ENTRY FOR  
JUNE 26, 1958

Civil No. 1623

UNITED STATES,

Plaintiff,

vs.

AIR BASE HOUSING, INC., et al.,

Defendants.

HEARING

J. Kennard Cheadle and T. David Gnagey, appearing for Air Base Housing, Inc.

Donald N. Olson, Spokane County Deputy Prosecuting Attorney, appearing for Spokane County.

Civil No. 1667

UNITED STATES,

Plaintiff,

vs.

MOSES LAKE HOMES, INC., et al.,

Defendants.

HEARING

Lyle L. Iversen and Josef Diamond appearing for Moses Lake Homes, Inc., Larson Air Homes, Inc., and Larson Heights, Inc.

Paul Klasen, Prosecuting Attorney of Grant County, appearing for Grant County.

These causes came on before the Court for hearing on tax claims of the counties and petitions by the lessee defendants to withdraw funds on deposit.

The following Exhibits were admitted in evidence:

## Case No. 1623

Air Base Housing, Exhibit A, Certified copy of Determination.

## Case No. 1667

Grant County, Exhibit A, Copies of File No. 8788.

Grant County, Exhibit B, Copies of File No. 8095.

Grant County, Exhibit C, Copies of Assessor's Detail List of Personal Property.

The Court announced his ruling as follows:

Case No. 1623—In favor of Air Base Housing, Inc.; the claim of Spokane County for taxes was denied; fund may be distributed to the lessee defendants.

Case No. 1667—In favor of Moses Lake Homes, Inc.; Larson Air Homes, Inc., and Larson Heights, Inc.; the claim of Grant County for taxes was denied; funds may be distributed to the lessee defendants.

Findings and judgment to be presented July 3, 1958, at 10:00 a.m. [186]

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[Title of District Court and Cause No. 1667.]

HEARING, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Lyle L. Iversen appearing for the defendants Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc.

Paul Klasen, Prosecuting Attorney, and Jennings Felix appearing for the defendant, Grant County, Washington.

This matter came on before the Court for settlement of the Findings of Fact, Conclusions of Law and Judgment.

The Court also heard argument on the validity of the assessment of 1955 taxes against Moses Lake Homes, Inc.

Moses Lake Homes, Exhibit D, admitted in evidence.

The Court announced that the claim of Grant County for 1955 taxes would be allowed, and also the taxes for 1956 if levied before June 15, 1956.

Findings of Fact, Conclusions of Law and Judgment signed by the Court. [337]

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the original documents filed in the above-entitled cause, to wit:

Date Filed • Title of Document

3/1/58—Complaint.

3/1/58—Declaration of Taking (including certified photocopy of Dept. of Air Force letter, marked Incl. 13).

3/1/58—Affidavit (G. F. McGuire).

3/5/58—Notice (of condemnation) and Returns of Service.

3/1/58—Order for Possession.

3/7/58—Affidavit for Mailing Order for Possession.

3/6/58—Notice of Appearance (Moses Lake Homes, Inc., et al.).

3/7/58—Lis Pendens.

3/11/58—Motion for Temporary Restraining Order (with affidavit and copy of Declaration of Taking attached).

3/12/58—Temporary Restraining Order.

3/17/58—United States Marshal's Return (service of temporary restraining order).

3/19/58—Notice of Appearance (Grant County).

3/21/58—Motion to Extend Time for Hearing on Restraining Order. (No supporting affidavit attached.)

3/21/58—Order Extending Time for Hearing on Restraining Order.

3/26/58—Petition of Moses Lake Homes, Inc. for Order Directing Payment of Money.

3/26/58—Petition of Larsonaire Homes, Inc. for Order Directing Payment of Money.

3/26/58—Petition of Larson Heights, Inc. for Order Directing Payment of Money.

3/26/58—Personal Property Tax and Assessment Lien Statement (Exhibit A attached).

3/28/58—Disclaimer of The National Bank of Commerce of Seattle as to Parcels 1, 2, 3, and 4. (Exh. A attached).

3/28/58—Stipulation (for preliminary injunction).

3/28/58—Order Granting Preliminary Injunction.

- 4/8/58—Notice of Appearance (Federal National Mortgage Assoc.).
- 4/8/58—Petition of Grant County, Washington for Order Directing Payment of Money.
- 4/22/58—Disclaimer of Securities Mortgage, Inc. as to Parcels 5; 6, 7, 8 and 9 (Exhibit A attached).
- 6/13/58—Requests for Admissions (Grant County).
- 6/16/58—Responds of Moses Lake Homes, Inc., Larsonaire Homes, Inc. and Larson Heights, Inc. to Requests for Admissions (with Annex 1 attached).  
Second Request for Admissions filed on behalf of Grant County, Washington not submitted for the reason that no such document has been filed.
- 6/18/58—Response to Second Request for Admissions (Moses Lake Homes, Inc., Larsonaire Homes, Inc. & Larson Heights, Inc.).
- 6/16/58—Requests for Admissions (Moses Lake Homes, Inc., Larsonaire Homes, Inc. & Larson Heights, Inc.) with Annexes I thru XII attached.
- 6/26/58—Reply of Grant County to Requests for Admissions.
- 7/1/58—Answer of Federal National Mortgage Association.
- 7/3/58—Findings of Fact and Conclusions of Law on Petition for Order Directing Payment of Money.
- 7/3/58—Judgment for Payment of Estimated Compensation.

7/11/58—Appearance (Special Counsel for Grant County) with affidavit of mailing attached.

7/15/58—Motion for Amendment and for Additional Findings of Fact, Conclusions of Law, and Judgment.

Amended Findings of Fact and Conclusions of Law on Petitions for Order Directing Payment of Money. (Not signed by the Court.)

Amended Judgment for Payment of Estimated Compensation. (Not signed by the Court.)

Order Directing Replacement of Funds. (Not signed by the Court.)

7/14/58—Motion for New Trial or in the Alternative, for the Taking of Additional Evidence.

7/23/58—Order Denying Motion for New Trial or, in the Alternative, for the Taking of Additional Evidence.

7/23/58—Order Denying Motion for Amendment and for Additional Findings of Fact, Conclusions of Law and Judgment.

7/25/58—Motion for Disbursement of Estimated Compensation (Moses Lake Homes, Inc., et al.).

7/28/58—Order Directing Payment of Funds.

8/4/58—Notice of Appeal (Moses Lake Homes, Inc.).

8/7/58—Supersedeas and Cost Bond. (Moses Lake Homes, Inc.).



8/11/58—Notice of Appeal (Grant County).

8/13/58—Supersedeas and Costs on Appeal (Grant County).

8/11/58—Motion to Order Repayment of Funds into Registry of Court.

8/11/58—Motion to Approve Supersedeas Bond on Appeal of Grant County, Washington or in Alternative Set the Bond (no attached documents accompanied motion).

Clerk's Journal Entry for June 26, 1958.

10/8/58—Reporter's Record of Proceedings at the Trial (with oral decision of Court on 6/26/58 and 7/3/58).

Clerk's Journal Entry for July 3, 1958.

Grant County Exhibits A, B, C, and D (enclosed herewith but not attached hereto).

9/17/58—Statement of Points to be Relied upon by Moses Lake Homes, Inc.

9/17/58—The Designation of Contents of Record on Appeal (Moses Lake Homes, Inc.).

9/17/58—Designation of Contents of Record on Cross-Appeal (Grant County) with affidavit of service by mail attached.

9/12/58—Order Extending Time to Docket Appeal (to 9/25/58).

9/22/58—Order Extending Time to Docket Appeal (to 10/31/58).

and that the same constitute the record for hearing of the appeal from the Judgment for Payment of Estimated Compensation entered on July 7, 1958,

and from the Order Denying the Motion for Amendment and for Additional Findings of Fact, Conclusions of Law and Judgment entered July 23, 1958, and from the Order Denying New Trial, or in the Alternative for the Taking of Additional Evidence entered on July 23, 1958, and from the Order for Disbursement of Funds entered on July 28, 1958, as called for in the Appellants-Appellees' Designation of Contents of Record on Appeal and Designation of Contents of Record on Cross-Appeal, respectively.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District, this 27th day of October, 1958.

[Seal]      /s/ STANLEY D. TAYLOR,  
Clerk, U. S. District Court Eastern District of Washington.

[Title of District Court and Cause.]

### ORDER DENYING MOTION FOR REPAYMENT OF FUNDS

Defendant Grant County having moved for an Order directing funds heretofore disbursed to Moses Lake Homes, Inc., Larsonaire Homes, Inc., Larson Heights, Inc., to be paid into the registry of the Court, and to permit said Grant County to file Supersedeas Bond to stay such disbursement, and defendant Moses Lake Homes, Inc., having moved to withdraw its Supersedeas Bond and substitute

a cost bond, said motions having regularly come on for hearing by the Court on the 3rd day of November, 1958, Grant County being represented by Jennings P. Felix of Felix & Abel, and defendant, Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., being represented by Simon Wampold of Lyette, Diamond & Sylvester, and the Court having heard the arguments of counsel, and being fully advised in the premises,

It Is Hereby Ordered that the said motions above referred to be and the same are hereby denied.

Done In Open Court this 24th day of November, 1958.

/s/ WILLIAM J. LINDBERG,

District Judge. [349]

Presented by:

/s/ JENNINGS P. FELIX,

Of Counsel for Defendant

Grant County, Washington.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed November 24, 1958.

[Title of District Court and Cause.]

**SUPPLEMENTAL CERTIFICATE  
OF CLERK**

United States of America,  
Eastern District of Washington—ss.

I, Dorothy Moulton, Acting Clerk of the United States District Court for the Eastern District of

Washington, do hereby certify that the document annexed hereto is the original document filed in the above-entitled cause on November 24, 1958, and submit it for consideration of the Court with the remainder of the record on appeal in this matter which was forwarded on the 27th day of October, 1958:

Title of Document: Order Denying Motion for Repayment of Funds.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District, this 5th day of December, 1958.

/s/ DOROTHY MOULTON,

Acting Clerk, U. S. District Court for the Eastern District of Washington.

[Title of District Court and Cause.]

### BOND FOR COSTS

Know All Men By These Presents:

That: we, Moses Lake Homes, Inc., a Washington corporation, one of the defendants as Principal, and the Fidelity and Deposit Company of Maryland as Surety, are held and firmly bound unto United States of America, its executors, administrators, or assigns, in the sum of Three Hundred and No/100 (\$300.00) Dollars, lawful money of the United States of America, to be paid unto the said Grant County, Washington, and United States of America, their executors, administrators, or assigns, to which payment well and truly to be

made, we do bind and oblige our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seal and dated this 5th day of January, 1959.

Whereas, the above-named Plaintiff heretofore commenced an action in the United States District Court, in and for the Eastern District of Washington, against the said Defendant.

Now Therefore, the Condition of This Obligation Is Such, That if the above-named **Moses Lake Homes, Inc.**, a Washington Corporation, one of the Defendants in the said action shall pay on demand, all costs that may be adjudged, or awarded against it as aforesaid in said action; then this obligation shall be void, otherwise the same shall be and remain in full force and virtue. This bond is filed as a substitute for Supersedeas and Cost Bond of \$60,000.00 dated August 1, 1958, pursuant to order of the U. S. Circuit Court of Appeals for the Ninth Circuit signed January 2, 1959.

Signed and sealed this 5th day of January, 1959.

**MOSES LAKE HOMES, INC,**

/s/ By **GEO. WESTERMAN,**

[Seal] **FIDELITY AND DEPOSIT COMPANY OF MARYLAND,**

/s/ By **GUERTIN CARROLL,**

**Attorney-in-Fact.**

Acknowledgment of Receipt of Copy attached.

[Endorsed]: Filed January 23, 1959. Paul P. O'Brien, Clerk.

In the District Court of the United States, Eastern  
District of Washington, Northern Division

Civil No. 1667

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Certain Interests in Property in Grant County,  
Washington; MOSES LAKE HOMES, INC.,  
a Washington corporation; LARSONAIRE  
HOMES, INC., a Washington corporation;  
LARSON HEIGHTS, INC., a Washington  
corporation; THE NATIONAL BANK OF  
COMMERCE OF SEATTLE, a corporation;  
SECURITIES MORTGAGE, INC., a Wash-  
ington corporation; INSTITUTIONAL SE-  
CURITIES CORPORATION; NEW YORK  
TRUST COMPANY; FEDERAL NATION-  
AL MORTGAGE ASSOCIATION; GRANT  
COUNTY, WASHINGTON, a municipal cor-  
poration; Unknown Owners, Defendants.

### TRANSCRIPT OF PROCEEDINGS

Before: Honorable Sam M. Driver, Judge, with-  
out a jury.

Date: June 26, 1958.

Appearances: For the Plaintiff: Ronald R. Hull,  
[189] U. S. Attorney, 334 Federal Building, Spo-  
kane, Washington. For the Defendants: Represent-  
ing Moses Lake Homes, Larsonaire Homes, and



Larson Heights Homes, Inc.: Iversen, Lycette, Diamond & Sylvester, Attorneys at Law, Hoge Building, Seattle 4, Washington. Representing Grant County: Paul Klasen, Prosecuting Attorney, Grant County Courthouse, Ephrata, Washington. Jennings P. Felix, Special Counsel for Grant County, Attorney at Law, Felix & Abel, Northern Life Tower, Seattle 1, Washington. Representing Seattle Federal National Mortgage Assn.: Heckendorn & McNair, Attorneys at Law, Dexter-Horton Building, Seattle, Washington. [190]

**Be It Remembered:**

That the above-entitled action came regularly on for trial and determination on June 26, 1958, before the Honorable Sam M. Driver, Judge, without a jury, in the District Court of the United States for the Eastern District of Washington, Northern Division, Spokane, Washington, the plaintiff appearing [191] by Ronald R. Hull, U. S. Attorney; the defendants Moses Lake Homes, Larsonaire Homes, and Larson Heights Homes, Inc., appearing by Iversen, Lycette, Diamond & Sylvester; the defendant Grant County appearing by Paul Klasen, Prosecuting Attorney for Grant County and by Jennings P. Felix, Special Counsel for Grant County; the defendant Federal National Mortgage Association appearing by Heckendorn & McNair; and all parties having announced that they were ready for trial;

Whereupon, the following proceedings were had, to-wit:

The Court: In these two cases, one involving the Larson Air Force Base in Grant County, and the other the Fairchild Air Force Base here in Spokane, the Government acquiring the properties, has filed the usual declaration of taking and made a deposit in each case and various petitions have been made or filed here which call upon the Court to make a distribution of the deposit, that is the only thing that I have the power to do at this time, of course. I think under the statute, the declaration of taking statute, I have the right to distribute the fund deposited as the estimated compensation in advance of the trial on the issue of compensation, if somebody gets too much, they will get a deficiency judgment against them, but I assume you are willing to take that risk and, also, there is specifically mentioned in the statute the matter of making just and equitable provision for [192] payment of taxes.

Now, when I was in Yakima I wrote a letter to the Clerk, I am not sure that a copy went to the attorneys here, regarding the issues involved here in this case. I should think that the basic questions of law that I would be called upon to decide in the two cases are substantially identical, aren't they, so far as the main questions are involved, the question of whether the properties of the lessee ~~are taxable~~ by county and local taxing authorities, and it would seem to me that the basic facts should be such as can be agreed upon. Of course, all I have got so far is petitions for distribution of the fund and tax claims of the counties which don't make up any

factual issue, and if there is a dispute in fact, why, I will be off this bench in five minutes because I am not going to sit here all day and listen to legal arguments that have no factual foundation because it will all have to be heard over again. So, if you gentlemen can get together on the factual issues, I will hear your arguments. Otherwise, you all can go home and wait another day.

The factual issues will have to be made up by bringing in the witnesses and the documentary proof in the case of Grant County, while I haven't had time, of course, to look at these voluminous files in detail, I have to do the work of the court day by day as we go along. It would seem to me that most of the facts on which the legal issues depend have been [193] admitted in the requests for admissions and the one denial of Item 1, I believe, which was, I believe, the lease involved in the Offutt case.

Now, it is true that Grant County has made requests for a number of admissions, for instance, as to how long, what will be the life of the houses. That, I should think, would depend upon whether they are taxable as personal property, which I don't think is involved initially here, at any rate, and, also, there are a good many questions directed to the question of the making of street improvements and items upon which the Government's offset depends. Now, I think that that would be material, that information or those facts, would be material only if I come to the conclusion that the counties have the right to question the amount of the com-

putation of the offset that has been made, and I should think the orderly way to do would be to, first, argue and have the Court decide whether the computation or designation made by the particular official here is conclusive and binding upon the counties, and even if it isn't conclusive, of course, we have the question of whether this court would have jurisdiction over some officer of the Air Force, who, I understand, is in Washington, D. C., and our Marshal can't get that far to serve processes in the Eastern District of Washington, I should think, and it would seem to me rather conclusive that this Court wouldn't have jurisdiction even if these counties [194] had the right to go into that computation and show that they are too high.

So, I should think for the purpose of deciding the two basic law questions here, one, is the property of these lessees taxable by the county; And, two, whether the computation made of the offset in favor of the lessee by the Department of Defense is conclusive and binding or not, at least, is a question that was not subject to question by the counties in this court. Now, if you get the facts, or have the facts on those two questions I think it would be well worth-while to argue them while they are here and have the matter well in mind, and while I didn't get Spokane County's brief until about two minutes ago, I have briefs on the other case, the Grant County case, it has been fully briefed and I think I have pretty well in mind the statutes and authorities which I will attempt to construe and interpret in your favor, each side.

And I might say that while I appreciate the fact that counsel are more familiar with the State practice than they are in Federal Court, and that applies even to the ones who come here regularly, they have more practice in the State court than they have in the Federal Court, but I notice that there seems to be a general practice here of bringing briefs in at the time a matter is set for argument, and that means that what the attorney is doing is telling the Court that he [195] must take this case under advisement if he is to consider the brief, because I can't read the thing while you are arguing and you wouldn't want me to do that and I don't want to have to be reading briefs after you get through the argument and I don't want to get loaded up with briefs, and I quite agree with Judge Vanderbilt that a trial Judge should avoid taking a case under advisement like he should a plague, he has got a whole bunch of cases and the first thing you know they are three or four months old and everybody is complaining because you are not deciding them, and you just increase the time and effort by about three if you take cases under advisement.

I will hear from anybody. First, I think we should get a statement here of who is appearing.

Mr. Cheadle: For petitioner, Air Base Housing, Inc., myself, J. Kennard Cheadle, and T. David Cinagey, appearing for Air Base Housing.

Mr. Olson: For Spokane County, your Honor, my name is Donald N. Olson. If the Court please,

I have not yet been admitted to practice in this court. I have a petition filed.

The Court: Well, it certainly wouldn't be necessary for any representative of a municipality or county in this District to be admitted. If the County is made a party, you have a right to come in or, at least, I will give you the right, if you need it. You may appear in this case without a petition for general admission, if you wish. If you wish [196] to present a petition for general admission, you may do so, it is not necessary.

Mr. Olson: The petition has been presented. There is the matter of swearing in.

The Court: Have you paid the three dollars, then? That is an item. Well, you may as well be admitted, then.

Clerk of the Court: Swear Mr. Olson now, your Honor?

The Court: Yes.

(Whereupon, Mr. Olson was duly sworn by the Clerk.)

Clerk of the Court: You may pick up your certificate in my office.

The Court: Now, let's see, we have got the Air Base Housing and Spokane County. Are those the only two parties from Spokane in the Fairchild case?

Mr. Cheadle: Yes, your Honor.

The Court: Of course, the Government isn't entered at this particular time?

Mr. Cheadle: Apparently, not, as stated to me informally by the District Attorney.



The Court: Well, I can't see what interest they have here. They have deposited the money and it should be a matter of indifference to the Government as to how it is distributed. Then, the Grant County case?

Mr. Iversen: On behalf of the three housing corporations, Moses Lake Homes, Inc.; Larsonaire Homes, Inc., and [197] Larson Heights, Inc., I am appearing, Lyle Iversen and Joseph Diamond, of the firm of Iversen, Lycette, Diamond & Sylvester.

Mr. Klasen: Your Honor, on behalf of Grant County, Paul Klasen is appearing.

The Court: Am I right in assuming that the basic facts are admitted in the admissions here? I don't think that it is necessary to get the admission as to what the lease was in the Offutt case, that isn't directly involved here. It can be argued to what extent it applies or is distinguishable, and so on. I think some place here the documents are set out, is that in the Fairchild case, showing the delegation of authority down through the chain of command?

Mr. Iversen: We have it in our requests for admissions in the Moses Lake case.

The Court: That is in the Grant County case, isn't it?

Mr. Diamond: That is right.

The Court: In the other case, as I understand it, all of these documents on which this computation of the benefits or offset is based are published in the Federal Register and, if so, they have the

force of law and the Court can take judicial notice of them. I think for convenience it's certainly better to have them in here because it is a terrific job for me, at any rate, to run these things down in the Federal Register but, as a matter of law, I don't think you need [198] a stipulation on that.

**Mr. Cheadle:** With respect to the designations made by the Secretary of Defense and, in turn, another designation and the Section 511 determinations themselves, copies of which are exhibits to our petition and I have here in court certified copies received from the Air Force from Washington, D. C., of those three exhibits and they will, even though published in the Federal Register, be submitted, certainly it would be more convenient to the Court.

**The Court:** Well, yes, I think they should be in and I favor that method and I think if I were you to complete the record here I would put them in as exhibits, but in the Spokane case. We haven't any agreement, or haven't any proof in the record as to just what sort of a project this is or what the interests of the lessees are or how they were acquired, have we?

**Mr. Cheadle:** That is correct, your Honor. We can here in open court, if your Honor wishes, stipulate, if Mr. Olson be agreeable. I think it is beyond question, I think the County has not questioned and cannot very well question your Honor taxing property out of, if you please, property located on Fairchild Air Base, owned by the United

States, unless it is conceded that it is a Wherry Act Project.

The Court: Of course, what I can do here if you can't reach an agreement on the facts in the Fairchild case, I [199] haven't heard from Mr. Klasen yet, I must hear from him, first, but if there is a substantial agreement on the facts on which, initially, the questions of law can be decided in the Grant County case, I would be inclined to hear the argument in that unless you gentlemen would decide it as amicus curiae and then change your minds in that case, I can do it that way, unless you change your minds.

Mr. Olson: If your Honor please, we certainly stipulate that the Fairchild Housing Project out there certainly is a Wherry Project. Of course, I am not challenging the designations whatsoever that are attached, I am not questioning any authority there.

The Court: Well, I see, I think they should be put in here, anyway, for the sake of certainty. In the Grant County requests they are set out, four admissions, aren't they?

Mr. Iversen: Yes.

The Court: Mr. Klasen, what is your thought on this factual situation?

Mr. Klasen: Well, your Honor, Grant County has stipulated to almost all of the facts that the Larson Air Base corporations have requested, with a very few minor deviations. However, the housing corporations have not admitted the request for facts submitted by Grant County.

The Court: Are any of those facts that you have [200] requested, are they necessary for the Court to decide whether the lessee's property is taxable by the county and whether the designation that has been made of offset may not be questioned, may or may not be questioned, by the county?

Mr. Klasen: Well, first, your Honor, with regard to designations as to the actual amounts, Grant County is not questioning the amount of the designations as far as the actual computations only with the exception as to the allocation of the various amounts. In other words, they will allow \$3,000.00 for street improvements. We are not questioning the \$3,000.00 as to whether or not it can be allowed for street improvements, but insofar as the facts and the basic issue of whether or not they are taxable in the first instance, we feel that if that matter has been resolved insofar as Moses Lake Homes is concerned and whether or not the same facts apply to Larsonaire or Larson Heights is a question on which the facts have not been resolved. We feel that the facts have been resolved insofar as Moses Lake Homes, Inc., is concerned.

The Court: What facts remaining are there to be determined in the other lessees?

Mr. Klasen: Well, the facts are the same in all instances in the other corporations insofar as the length of life of the buildings is concerned.

The Court: What bearing does the length of life have [201] on the basic question here?

Mr. Klasen: Well, we don't know, your Honor, how that might appear to the Court, but it was

brought up before in the Superior Court and there is some mention of it in the Offutt Housing case.

The Court: Wouldn't that have a bearing only on the amount of the taxes and not on whether the county has a right to impose them or not if the buildings have a life longer than the term of the lessee's, then, it may be argued that they are in whole or in part, their value is a part of the realty, but I should think that so far as the county's right to tax is concerned, I don't think it is material. The ordinary life of the buildings, I think, it would be admitted is less than the term of the lessees but the lessees say, "Well, but there is a provision for building up reserve here for replacement and repair of these buildings so that they will be kept up in perpetuity up to and beyond the term of the lease", isn't that the position that the lessees take?

Mr. Iversen: That is right.

The Court: Now, how could that affect the right to tax if the county hasn't got the right to tax, if I hold that you haven't the right, it doesn't make any difference whether the buildings are going to last a thousand years or one, I should think. If I hold that you do have, then, there could be some question raised by landowners that you have tax due [202] because you have included houses which shouldn't be included here. Is that in question so far as the issues here, are you questioning the amount of the tax?

Mr. Iversen: I don't think that it is, primarily, the amount of the tax.

The Court: It is not the amount of the tax or whether they have a right to tax at all?

Mr. Iversen: It's whether they have got a right to tax at all.

The Court: Well, it may be I will have to turn it completely around the other way and hear the Spokane County case, first. It will be a short hearing.

Mr. Cheadle: Your Honor please, may I make a short statement? It is, perhaps, sort of elemental but it is a reverse approach. First, these condemnation cases are proceedings in rem. Second, the money in court stands in place of the property taken.

The Court: Yes, there is no question about that.

Mr. Cheadle: It is long well-established. Therefore, the only property on which taxes could be sought in this condemnation case by these counties is taxes on the property taken and as the complaints in condemnation and the declarations of taking explicitly set forth, and I will speak now with regard to Air Base Heights, but I think the same thing is true with regard to Air Base Housing. The right, [203]title and interest of Air Base Housing, Inc., arising out of three specified leases and some easements and related property, therefore, your Honor, there could be no tax, I submit, paid out of moneys deposited in court unless it be a tax on the property taken. The only property taken, I may say, are the easements, or the leases and the easements, which went along with them. Therefore, it



could only be a tax on leasehold that could be payable out of this deposit.

The Court: Well, the Government is taking, I assume that you in saying "leaseholds", do you mean everything goes with it that the Government has taken? It's my understanding that they have taken, oh, electric ranges and refrigerators, and so on, in the houses?

Mr. Cheadle: Those are a part of the lease.

The Court: They are a part of the lease?

Mr. Cheadle: Yes.

The Court: Well, does anybody question that statement of Mr. Cheadle that what we have here is ascertaining the taxes against the property taken? The only reason that the Government can take the property, constitutionally, you can't under the Constitution of the United States take private property for public use without paying just compensation so that the fund deposited into court stands in place of the property, that is all it does. That is the only reason for making provision for advance deposit and the deposit here [204] stands for the property and what we have got to decide is whether the county has any valid tax lien and claim outstanding against this property taken and the fund which stands in place of it. And I still would like to know whether there are further facts that should be established, I suggest this, if you have further facts that you think are essential to the decision of these questions here, perhaps, you can get counsel to stipulate to them.

Mr. Olson: Your Honor, I am not aware of any further facts.

The Court: No, I am talking about the Grant County case, now.

Mr. Iversen: I don't think there is any issue, remaining, of fact, I think it's all before the Court.

The Court: Well, Mr. Klasen seems to disagree with that.

Mr. Klasen: Do you want to stipulate that they are correct?

Mr. Iversen: You say they are correct. I might question the materiality.

The Court: What is that, Mr. Iversen?

Mr. Iversen: They are pleadings in the previous lawsuit, there has been some litigation about taxes. We wouldn't raise any question about it. I would raise a question about their materiality. [205]

The Court: I see, well, if you wish to have them put in here marked as an exhibit, I will consider them, if they are material.

Mr. Iversen: That can be a matter of argument as to whether they are material.

The Court: Yes, I will wait until after the argument and I think if they are material I will have them admitted in evidence, but I think they should be marked now, if you will, please. That will be Grant County's exhibits.

Clerk of the Court: All right, I will mark these as Grant County's Exhibits "A" and "B", if your Honor please.

The Court: So they won't be confused with the numbers in the condemnation?

Clerk of the Court: Right.

(Whereupon, Grant County's Exhibits Nos. "A" and "B", respectively, were marked for identification.)

The Court: Another thought occurred ~~to me~~ here that, of course, we can, perhaps, discuss that case later on, it might have some bearing as to how I decide this case but we have here, certainly, a separate issue based on the validity or invalidity of the tax claims of the counties and I think that I should or, at least, I make this suggestion that counsel consider whether I shouldn't enter a separate judgment under, I believe, it's Rule 58, at any rate, I believe the Rules of Civil Procedure provides for it, that an immediate [206] appeal can be taken, in a separate appeal, if the Court finds that there are no separate issues and there is no cause for delay and it is in the interests of justice that it be taken in a separate appeal or separate issue. Now, the point is that this is going to be a long case if you people have to wait until that is over. I should think it would be a voluminous record. I think it would be better to have it in a position where it could be immediately appealed on a rather short record as to the facts here.

Mr. Iversen: We would like that.

The Court: I think the county would like that, too. I have no preference as to the order here. I think a good way to decide it is the way they happened to fall on the calendar here. I think that is in the order in which the cases were filed. I called the Spokane County case because Spokane County

is involved, first, and, then, Grant County. I wonder if it might not be well here, we are arguing the two cases together, to have the attorneys representing the leasehold interests argue first in both cases and, then, have the attorneys for the counties answer and then have an opportunity for reply? That is just a suggestion.

Mr. Iversen: If the Court please, I am not sure that the questions are the same in the two cases. Actually, we are not familiar with the other case on account of the fact that there may be some issues that would be different, I [207] think that would be confusing.

The Court: Well, perhaps, we had better proceed one case at a time, possibly. I will ask counsel to refrain from duplicating as much as possible where the arguments are the same. We will proceed in the Spokane County case, then.

Clerk of the Court: Your Honor, I marked the document that Mr. Cheadle handed up as Exhibit "A" in that case, No. 16 it was.

The Court: What party is that?

Clerk of the Court: Air Base Housing.

(Whereupon, said document was marked Exhibit "A" in Case No. 1623.)

Mr. Cheadle: If it please the Court, there is on deposit in this civil action No. 1623 \$175,500.00.

The Court: Oh, pardon me for interrupting, Mr. Cheadle, but I have a note here that I would like to mention in regard to the other case, the Larsonaire case. Is there any question about Grant

County's right to collect taxes against the lessee's property for the year 1955?

Mr. Iversen: Yes, your Honor, we would question that, too.

The Court: I understood that their last amount didn't apply to taxes that became a lien upon the property prior to June 15, 1956?

Mr. Iversen: We have some other reason why.

The Court: I see, all right. Well, there is that difference, then, there is that different issue. I think the materialest tax here is 1956.

Mr. Cheadle: Taxes levied in '56 payable in '57. Tax payable in '57, levied in '57, payable in '58. The county does claim that with respect to taxes levied in '57 payable in '58, I think.

The Court: I see, all right.

Mr. Cheadle: The Offutt case has been mentioned by the Court.

(At this point the argument of Mr. Cheadle with respect to Civil Action 1623 was omitted.)

(Whereupon, court was adjourned until 2:00 o'clock p.m. on June 26, 1958.) [209]

Spokane, Washington, Thursday, June 26, 1958,  
2:00 o'clock p.m.

(Whereupon, the trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to-wit:)

Mr. Iversen: Is your Honor ready to proceed?

The Court: Just a moment, before you start, I had gone into the file and the briefs of the Spokane

County case, first, and I notice that there are some different or, at least, additional contentions, I believe, made. Your contention is that there never has been any proper and valid levy of an assessment or levy of a tax on the leasehold in Grant County?

Mr. Iversen: That is right, your Honor.

The Court: Is it your contention that the physical personal property there belongs to the Government?

Mr. Iversen: That is correct.

The Court: Even the refrigerators and the furnishings in the houses?

Mr. Iversen: Yes.

The Court: And the form of this assessment, they just assessed the physical personal property and didn't assess the leasehold?

Mr. Iversen: That is correct, your Honor, under the [210] laws of the State of Washington in order to make an assessment the Assessor makes up a detailed assessment list and that is on a form prescribed by the State Tax Commission. That form prescribed by the State Tax Commission contains a distinct item for improvements on land, the fee of which is vested in the United States, the State or any political subdivision thereof. It also contains another distinct item for a leasehold. Now, in each case under the exhibits which are before the Court the property was not listed as a leasehold but was listed as the improvements, as to the physical property, and it was the physical property that these parties, the county, undertook to sell in this case. There has never been a listing by Grant



County of a leasehold and a leasehold just isn't on the tax rolls.

The Court: Well, I didn't want to get you out of your planned order of presenting this matter. I presume you will cover that?

Mr. Iversen: Yes, your Honor.

The Court: I had some difficulty in the Grant County file ascertaining just what these determinations were. I thought I saw in the brief that the determination has been made for only one year, is that correct?

Mr. Iversen: The determination was made for September, 1957, and that determination covers all the expenditures that have been made up to date.

The Court: September, 1957?

Mr. Iversen: September, 1957, yes. Now, that does not purport to be a determination for a particular year. The document, itself, the determination is in the file, it's one of the exhibits here attached to the requests for admissions. That determination does not purport to be made for any particular year and I would say that as of 1957, as of the same date, the determination was made at the same time these assessments were made because under the procedure that is followed assessments were not made currently for the reason that there were injunctions pending.

The Court: There was an injunction in connection with the State case and, then, of course, there couldn't be an assessment made and they made the assessment as of omitted property?

Mr. Iversen: So they used the statute on omitted

property and the statute on omitted property calls for the placing on the tax rolls for the current year the property that has been omitted at the millage for the past year, so that this property was picked up and was put on the assessment rolls as of the same year that this determination was made, that is, the determination was made in September and the property was picked up.

The Court: Pardon me, is it more than the amount of the taxes? [212]

Mr. Iversen: Yes, it's about \$111,000.00. Now, that will depend somewhat on whether or not the 1959 taxes will be included, that is one of the things I want to talk about.

The Court: Yes, now, how about the 1958, it has been a long time since I have had intimate knowledge of taxes, since I was Prosecuting Attorney, but do you refer to the taxes for the year when they are assessed on the year when they are payable?

Mr. Iversen: The year when they are payable.

The Court: The 1957, spoken of as the year when they were paid, in 1957?

Mr. Iversen: Right, the 1958 tax, and that tax would become payable in 1959. Now, the procedure by which taxes become payable in Washington, I might just review that a little bit so as to refresh your Honor's recollection, first of all.

The Court: Yes, all right.

Mr. Iversen: First of all, the Assessor makes an assessment, he makes that, he starts making that early in the year. For instance, in 1958 he would start making up an assessment list. They specifically

list all the property, and that goes to the Board of Equalization. There is both a county and state board of Equalization, and that is, of course, where they fix the value on the property, and it is, [213] of course, assessed at fifty percent of its value. Then, in October of the same year in which it has been assessed, then, the County Commissioners determine the millage right then. They apply the millage rate.

The Court: When is that?

Mr. Iversen: October.

The Court: Up to that time all that you have got is just simply a valuation of the property for taxation purposes?

Mr. Iversen: That is correct. Then they apply that, then is when you make the levy, applying that to the detailed assessment list. Then, that is certified to the Auditor, who then issues a warrant. I believe that is certified in December, I believe, then, he issues a warrant to the Treasurer, which is authority to collect it, which he does about in January, and, then, the Treasurer starts collecting in February, and they refer to the taxes as the taxes of the year in which they become payable, so if we speak of 1959 taxes we will speak of taxes assessed in 1958 for payment in 1959.

The Court: Well, so far as '59 is concerned, I will hear from counsel on either side. Don't waste any time on that because this declaration of taking was filed November, the first, 1957, and the property all became the property of the United States, if I know that statute.

Mr. Iversen: In this case the declaration of taking [214] was March 1st, 1958.

The Court: Oh, did I look at the wrong document here?

Mr. Iversen: Oh?

The Court: I have a note here the declaration of taking was November 1st.

Mr. Chéadle: November 1st is the Air Base Housing case.

Mr. Iversen: Ours was much later, March 1st, 1958.

The Court: Oh, well, there might have been an assessment then before the declaration of taking.

Mr. Iversen: Well, that is one of the things I want to go into.

The Court: You had better go into it, then. I was under the erroneous impression it was November, the First.

Mr. Iversen: Now, we are in quite a different position than the people were in the Spokane County case.

The Court: (Interposing) Pardon me for interrupting you again, but how about the 1958 taxes, was there any determination made for that year?

Mr. Iversen: That is the same one which would become established by a levy made in October, 1957, and it was in September, 1957, that this determination was made.

The Court: I see, it will cover that year, then? I see, all right.

Mr. Iversen: Now, if the Court please, we are in [215] quite a different situation than they are in

the Fairchild case for the reason that in the Fairchild case a levy was actually made upon the leasehold. Now, in order for the counties to obtain anything in this case they must show that they have an interest in the property which is being taken. Now, the only thing raised before the Court here, the res before the Court is not physical property. The res before the Court here is a leasehold, it can't be anything else. As an illustration of that fact let's take the fact that the deposit that we are talking about here is only \$253,000.00, out of about, oh, several million dollars. I think there was about from three to, I can't remember these exact figures, I think about six million dollars actually went into this property, initially. Now, as an illustration of what the Government, themselves, considers that they are taking, they have deposited into court \$253,000.00 and, of course, it only requires an inspection of the pleadings, themselves, to show that what the Government is taking in this case is not physical property but it is all right, title and interest to Moses Lake Homes, a Washington corporation, arising out of a lease dated and bearing numbers, and so forth. In other words, all they are taking is a leasehold interest and that is necessarily so because by the contract between the parties which is in evidence it is specified that the buildings, themselves, are the property of the Government. An example [216] of that will appear in Section 11 of the lease in our requests for admissions.

The Court: Pardon me, would your position be

the same regardless of whether the property would be necessarily used up and consumed in the term of the lease? It still belongs to the Government but you have a right to use it, and if you used it during its life, you have used it up?

Mr. Iversen: That is right, it's our contention that this is Government property, that the buildings, themselves, are just what they purport to be in the contract, and here is what the contract says:

“The buildings and improvements.” Section 11 of the lease, and this is identical in all three leases:

“The buildings and improvements erected by the lessee constituting aforesaid housing project shall be and become, as concluded, the real estate and part of the leased lands of the United States leased to the lessee for the purpose of providing military housing in accordance with Title 8 of the National Housing Act \* \* \*.”

Now, you will note that it expressly says, “That the buildings and improvements erected by the lessee constituting the aforesaid housing project shall be and become as completed real estate and part of the leased lands and property of the United States.”

Now, that is what the contract says, that is [217] common law, also.

The Court: Well, unless there is an agreement to the contrary, they would become real property?

Mr. Iversen: That is right, they would become real property. Now, there is no agreement to the contrary, there is just a wealth of authority on that, that houses built on real property become the



property of the owner of the realty unless there is an authority to take them on, and there certainly is not in this case. So, what we have here is a property owned by the Federal Government subject to a long-term lease. In order to have a lien on the property it is necessary that the property be listed in a detailed assessment list. Under the laws of the State of Washington, Section 84.60.030 R. C. W. "Attachment of Personalty—Taxes", it says

"The taxes assessed on each item of personal property assessed shall be a lien upon such personal property from and after the date upon which it is listed with and valued by the County Assessor."

Now, that is where you start:

"And no sale or transfer of such property shall in any way affect the lien of such taxes thereon."

Now, you will note that that is where you get your lien, is from listing the property. Now, you will note here that this lien is supposed to relate back as of the time of the listing but there has been a decision of the Washington State Supreme Court in the case of Puget Sound Power & Light [218] Company v. Cowlitz County—38 Wn. (2nd), 907.

The Court: That is the same case that Mr. Cheadle discussed?

Mr. Iversen: Yes, I think he discussed that.

The Court: You cite an earlier one, too, I think, don't you, in 70 or 71 Washington?

Mr. Iversen: Yes, and this is based largely on

that case, and in this case it was specifically held that there can be no lien upon the property until the full process of taxation has occurred. That is, it must be levied, it must be assessed, levied and extended. Then it can relate back, but the whole process must be accomplished and there must be a definite and a fixed amount of the tax before it can become a lien, so that this property that is involved in this case having never been assessed has no lien upon it. Now, they undertook in this case to even attempt to sell the property. Now, an illustration of how wrong they are in trying to list the physical property, itself, is the very situation they were trying to create. The file here will show that they gave notice of sale not of a leasehold, but the County Treasurer's notice of County Treasurer's sale, and it is "8" to our requests for admissions, a notice of selling 200 dwellings, improvements on land owned by U. S. A. Now, they were not undertaking here, this carries out that matter of the oversight, you understand. In other words, this is what [219] the County undertook to do, that is, a levy on the physical property, and they undertook to sell the physical property and that occurred with respect to each of the three projects in this case and they issued a distraint notice and the distraint notice again was not a notice of distraint on the leasehold but upon the dwellings, upon the actual physical property.

Now, certainly, the Federal Government did not ever consent to the County's levying taxes and selling the Government's property. Now, they might

sell the leasehold, and Congress has given consent to the levying of taxes upon the leasehold, in the statute that has already been discussed here. That statute expressly does consent, under certain conditions, to the levy of a tax upon the leasehold. Now, what Grant County might have done is a different thing from what it did. A lien is created only if the proper procedures are followed and the lien becomes perfected. There becomes something upon which the lien can attach, but in this case Grant County, which might have done as Spokane County did, and levy a tax upon the leasehold, as Congress had authorized them to do, did not follow that procedure, but undertook to levy the tax upon the physical property. Now, I apprehend that counsel will say the reason they did that was because in the Offutt case, with which I think your Honor is already familiar, it will appear that the tax there was levied upon [220] the physical property; that that is what was listed there, but the difference is that in the Offutt case they were talking about the laws of Nebraska and the laws of Nebraska are quite different from the laws of Washington. And I don't know just what all the laws of Nebraska are, but the laws of Nebraska in regard to the listing of a leasehold read quite differently from the Washington laws, Section 77.12.9 of the Revised Statutes of Nebraska says:

"All improvements upon leased public lands shall be assessed to the owner of such improvements as personal property, together with the lease listed

and assessed, as such, in the place where the land is situated."

So that is the way you do it in Nebraska, you list the improvements together with the lease. But that isn't the way you do it in Washington. In Washington we have a statute which calls for listing of leaseholds and a special valuation of the leaseholds, Section 84.40.030 provides the manner in which you value a leasehold. Section 84.40.030 in its last sentence says:

"Taxable leasehold estates shall be valued at such price as they would bring at a fair cash sale for cash."

Now, that is the way you value a leasehold. Now, in our State under a detail assessment list we have a special place for putting the two kinds of property, we have a special way for valuing them, and they have not undertaken to [221] follow that. In Washington an assessment of personal property does not become a personal obligation of the owner of the property. That was held in the ~~Puget~~ Puget Sound Power & Light case and, of course, we wouldn't have that before the Court, anyway. All we have here is an in rem proceeding, but, at any rate, we have never gone through the proceeding and it is too late now to go through the proceeding to put this leasehold on the tax list, and that is true with respect to the 1959 taxes because as to 1959 taxes they have not yet become a lien on the property because under that Puget Sound Power & Light case they do not become a lien until after all the proceedings have taken place and all the

proceedings for 1959 would not take place until in October of 1958. With respect to the 1958 taxes, the leasehold simply isn't listed and the leasehold not having been listed, no lien has attached at the time that the Government took this property.

The Court: How is the assessment made for the 1959 taxes, was that an assessment of the leasehold?

Mr. Iversen: No, that is an assessment of the physical property.

The Court: The same as the prior year?

Mr. Iversen: Yes, all of the assessments are made in that manner, so that having never assessed the leasehold we can't tax the leasehold. [222]

Now, they say, or I apprehend that they are going to say, the leasehold and the physical property became merged in this case, some way there is an identity of interest so they undertake to levy a tax upon the physical property, the property that is attached to the Government's land, and that by the terms of the lease is Government property and by common law is Government property. All right, now, if they are going to levy on that sort of thing we have some constitutional and statutory provisions in Washington that would stand in the way. One of these is the compact with the United States contained in Article XXVI of the Washington Constitution. In that compact it says that:

"No taxes shall be imposed by the State on lands or property thereof belonging to or which may be hereafter purchased by the United States or reserved for use."

So, if the property—

The Court: (Interposing) Will you read that again, please? I was making a note.

Mr. Iversen: (Reading)

"No taxes shall be imposed by the State on lands or property thereof belonging to or which may be hereafter purchased by the United States or reserved for use."

Now, that was a compact with the United States and, as such, is specifically enforceable by the United States. In addition to that the State statute, itself, the one I [223] have cited in my brief, expressly provides that the property of the United States is exempt. It is exempt if it belongs to the United States from taxation. In addition to that, there is a State statute that says that Federal property shall be taxable to the extent it is permitted by Congress and that is even in the State Constitution. Amendment XIX of the State Constitution says:

"The United States and its agencies and instrumentalities. Property may be taxed under any of the tax laws in this State whenever or in such manner as any taxation may be permitted under the Constitution of the United States, notwithstanding anything to the contrary of this State."

All right, if they are correct in stating that they are taxing the physical property, then, they are taxing Federal property and they can tax it only to the extent that Congress permits, and if they don't comply with the Acts of Congress in respect to taxing this, they can't tax it.



Now, the argument that was made in the Spokane case was that this is private property, that the leasehold is private property, therefore, they can tax the leasehold without respect to the Act of Congress. That isn't true under their theory in our case. Under their own theory in our case they are attempting to tax Federal property. Now, there has not been any decision to the effect that the holding of the property for a term beyond its life merges the leasehold [224] into the ownership. That has not occurred in the Offutt case. The Court held that where the term was beyond the useful life of the property, that the value in Nebraska, the value of the leasehold, was equivalent to the value of the physical property. And that is what the State of Washington Supreme Court said in this Moses Lake Homes case. This matter, insofar as Moses Lake Homes, one of these defendants here, has been before the Washington Supreme Court twice and the Supreme Court on each occasion recognized the fact that the Federal Government is the owner of the property and that this is only a leasehold.

In the last of the cases, this is the one in which the personal property taxes were involved. Moses Lake Homes, Incorporated, versus Grant County, which is 151 Wn. Decs. at Page 254, the question, by the way, in that case was not raised as to whether or not they had properly assessed the leasehold. Here is what the Court said:

"We follow the Offutt case and hold that the value of respondent's leasehold interest"

Note the language:

"The value of respondent's leasehold interest at the nominal rate reserved is the full value of the buildings and improvements. We do this because the Supreme Court of the United States is the final authority on the extent of the Federal Government's waiver of immunity on Federal Projects, of State and local taxation, and because of the desirability of [225] uniform taxing benefits among the several States where these housing projects are located."

Now, the State Supreme Court there is talking about the leasehold interest and is valuing the leasehold interest on the basis, or identifying the value of the leasehold, with the value of the physical improvements, but they are not saying that the lessee is the owner of the property.

And in another case, in the case of *Moses Lake Homes versus State*—48 Wn. (2d), 499, the question there was whether the State was who should pay the State Sales Tax, who was the consumer, and under the State Sales Tax Law it provides that the consumer is the owner of the property, or the lessee of the property, and it was contended there that the Federal Government was the consumer and this is a question of who was the consumer, and the Court says:

"Appellant contends that it did not owe the tax that it had paid on the sales in question because the material that it bought, as well as furnished by its sub-contractors, went into the buildings which, after completion, belonged to the Federal

Government. From this appellant wants us to conclude that while it took delivery of title to and paid for the material in question, the sale was not a sale at retail because it was not a consumer and the sale was not an ultimate sale. The appellant contends the ultimate sale was the sale of the business to the Federal Government which resulted, or must be inferred from the fact that the buildings belonged to the Federal Government after their completion. This would be [226] true if the appellant had contracted to construct the buildings for the Federal Government at its expense. It is not true in this case because the Federal Government did not construct the buildings or buy them. Title to buildings may be acquired in many ways other than by a sale. In the instant case title accrued——"

Now, note this:

"——accrued to the Federal Government through ownership of the land upon which appellant had been induced to build by reason of the long-term lease given to it and the complete financing procured for it by the Federal Housing Administration."

So, the State Supreme Court has twice recognized that the title is in the United States, so there is no identity of the property with the leasehold, and the leasehold having never been assessed and being the only thing that is in this condemnation, has no lien attached to it and there is nothing here upon which the County can make any claim.

In the State of Washington it has been held

by our Supreme Court that a very long-term lease does not, under the Laws of Washington, result in a merger of the ownership and the lease.

In the case of *Ex rel Heller versus Jackson*—82 Wash., 351, it was held that a lease for 999 years did not amount to ownership of the property and the Court said:

“As a matter of fact, this contention may be correct.” [227]

And the same contention was made there that is made here:

“But, as a matter of law, the lessees do not own the fee and are not the owners of the road. They are simply lessees for a given time.”

Now, even for 999 years the Court has held that that doesn't merge the ownership.

Now, have they assessed the leasehold? And if we had a detailed assessment list listing the leasehold and they had gone through the proceedings of equalizing the value of the leasehold and levying the tax on the leasehold, then, we would have a different situation, there would be a lien on it, but that just didn't occur in this case.

Now, in the previous case there has been considerable discussion about the matter of this Federal statute passed in 1956 to the effect that no taxes or assessments, et cetera, may be levied except under these conditions, but now there are some of these conditions that have not been discussed, one of them that no such taxes or assessments not paid or encumbering such property on the interest of such lessee shall exceed the amount of taxes or

assessments upon other similar property of similar value unless in such amount as the Secretary of Defense may determine, and so forth.

Now, note this part of it, in order to tax this property by the consent of Congress they may not tax on any [228] different basis, any discriminatory basis. The tax shall not exceed on such property, shall not exceed the amount of taxes or assessments on other similar property of similar value. Now, what has happened in the State of Washington? Well, in the State of Washington the law is quite definite as to how you determine the value of a leasehold. First of all, it's stated by statute, that statute that I referred to a while ago says in regard to a leasehold:

"The taxable leasehold of the estate shall be valued at such price as it would bring at a fair sale for cash."

The law of Washington with respect to leaseholds on publicly-owned property is very well established, also, by the decisions of the Washington Supreme Court, and there are four of those decisions, and this has been the law in Washington for a very long time, and the law in Washington is that in valuing a leasehold you determine its value by what a willing purchaser would pay to a willing seller, considering the burdens and benefits of the leasehold, and the Court specifically held in the first of the Metropolitan Building Company cases, which are cases directly in point, that it was error to determine the valuation, on the value of the physical property. Now, the Court

specifically held that and repeated it four times and they have never departed from that on any kind of a leasehold, except the Wherry Housing case, and in the Wherry Housing case our Supreme Court said in this [229] *Moses Lake Homes* case that

"We are taxing this on the basis of the value of the physical property."

And they do that on the strength of the *Offutt* case. Now, the decision of the Supreme Court of the State of Washington is, of course, a declaration of what the law is of the State of Washington, and I take it that it is as much the law of the State of Washington, having been decided by the Supreme Court, as if the Legislature had passed it. That is what the State of Washington does for Wherry Housing property.

Now, in the *Metropolitan Building Company* cases we have an exactly parallel situation. There we have state-owned land which was leased for a period of fifty years to a corporation which was required to erect buildings upon it which became the property of the State and it was sought to tax that property not upon the value of the leasehold but upon the value of the buildings that were placed upon it. Now, that case is exactly like ours, that is Governmental land and that is a long-term lease, a fifty-year lease, and we had exactly the same contention that is raised here and the Court said in this first *Metropolitan Building Company* case, this is 162 Wash., 409: (at P. 412)



"Whereas, under the rule as we find it to be, the present worth of the lease from year to year, considering also the term, fixes a criterion of value easily ascertainable and just to both parties. [230] Therefore, an assessment based upon the value of the improvements or the amount invested therein was erroneous and entitles respondent to relief."

Now, that is exactly the situation here and it is exactly what Washington is now undertaking to do in the Wherry Housing cases, and this case is still good law. This has been repeatedly followed by the Supreme Court of Washington.

The fourth Metropolitan Building Company case was the case in 144 Wash., 469, and in that case the Court again said that they were following their previous decision and, further, they held this, as they held in the two cases in between: that in determining the value of a leasehold in the State of Washington you fix its value by what a willing purchaser would pay to a willing seller with the burdens and benefits. Now, these Metropolitan Building Company cases are exactly parallel to this for another reason, and that is that there you had a mortgage on the leasehold and the Court said that it would not be fair to tax the leasehold without considering the burden on it, the obligation to pay off the leasehold and, therefore, in determining the value of the lease you hold you had to see what a willing buyer would pay to get the property on which, and to get the leasehold on which he still had to pay off the mortgage.

The Court: I am quite sure the taking in the

Fairchild case here was subject to the mortgage, was it not? [231]

Mr. Cheadle: It was, your Honor.

The Court: Was that the same thing?

Mr. Iversen: Well, that is one of the things that we want to raise with your Honor later on. It doesn't say so in the pleadings and we assume that the Government is going to do something about relieving us from the mortgage.

The Court: What is the amount of the mortgage?

Mr. Iversen: It's pretty big.

Mr. Diamond: Six million.

The Court: What I had in mind, it is very much more than the amount of the deposit, expressly as stated here.

Mr. Cheadle: Your Honor, I am quite sure it is stated as being expressly subject to the mortgage.

The Court: Yes, that is right, and that is not true in your case?

Mr. Iversen: They haven't even taken off over the mortgage to the point where we can get our reserves back. The mortgagee is still holding out on us, so we don't know, but, at any rate, the Supreme Court of Washington in this last Metropolitan Building Company case said:

"We cannot conceive of one desiring to purchase closing his eyes to actual experience and efficiency. Moreover, the theory advanced by the city, as we know it, is condemned by previous holdings in the cases already cited."

The Court: Well, in the Metropolitan there was

[232] a mortgage on the leasehold, as I understand it?

Mr. Iversen: There was a mortgage on the leasehold and in the second Metropolitan Building Company case the Court expressly discussed that problem and there it was sought to levy the tax, again they sought to levy it on the basis of figuring out the value of the physical property and capitalizing the thing, and the Supreme Court held that they couldn't do that.

And that was affirmed in this last of the Metropolitan Building Company cases. Now, that is the fixed and established law in the State of Washington with respect to all of the property and Congress has not consented to the taxation of Wherry Housing Projects on any basis different from the basis upon which other leaseholds are taxed by the State of Washington. So that whatever the law is in Nebraska, where the Offutt case was, whatever the law is in Nebraska that is not the law of the State of Washington because the State of Washington has specifically held four times that on publicly-owned land where there is an improvement subject to a lease that the taxation is only of the value of the leasehold.

Now, of course, we have this statute which goes on to provide that the amount of taxes can be only on this equalized basis, less the amount that the Secretary determines to have been expended. Now, Congress could have denied any [233] taxation at all and if the theory of the County is correct that they are taxing the physical property which be-

longs to the Government, certainly, they are taxing only with Congress' consent, and if Congress had said, "You can tax this only at thirty percent of its value, or you can tax it at such amount as shall be determined", or whatever they said, the County is bound by it, they are operating only under this permissive authority given by Congress.

The Court: Well, of course, you wouldn't concede that Congress was given any permission to tax Government property?

Mr. Iversen: Oh, not Government property.

The Court: It's the property of people with whom the Government has contracts?

Mr. Iversen: That is right. Now, if the County furnishes schools and the County doesn't furnish streets, as they undertake to contend, that is the kind of a thing that it was up to the Secretary to determine, but Congress has vested in the Secretary the administrative determination of these amounts; and the Secretary has made them, and, as has been said previously, that part, reviewing the action of the Secretary, I think is not before the Court here. We, in this case, are not subject to this tax, not merely by reason of the fact that there has been this amount of money expended which was equal to the full amount that is due under our [234] taxes, but also due to the fact that there is no adequate levy and the fact that the State of Washington has not undertaken to assess this property on the same basis as it assesses other property.

Now, it will be noted, I have covered this a lit-

tle bit before but I would like to go into it again so as to be sure your Honor gets it, there is only one determination made and that was made, as I said, in September, 1957, but that was at about the same time and during the same year as these assessments were made. Section 84.40.080 of R. C. W. is the one under which most of this property is picked up, and here is what that Section says:

"The Assessor, upon his own motion, or upon the application of any taxpayer, shall enter upon the detailed assessment list of the current year any property shown to have been omitted from the assessment list of any preceding year at the valuation of that year."

Now, you will note that they enter it on the assessment list of the current year, so that this property might have been assessed in the previous year, is picked up as of the current year and that is the same year in which the Secretary has made his determination, so having one determination giving all the amounts that were accrued up to that time, can be properly offset against the taxes that were due at that time, so it doesn't make any difference if they have not made separate determinations for separate years. [235]

The Court: Pardon me, this matter of the offset by reason of the determination of benefits by the Secretary of Defense, really, is by delegated authority?

Mr. Iversen: Yes.

The Court: That applies to all your years here, according to your position, except the 1955 year,

I presume? In 1955 there would have been an actual levy before June 16?

Mr. Iversen: There was an assessment made in 1955 but I think by the requests for admissions it will show that that was retained before it was completed and, therefore, there was no levy.

The Court: So, I see, there was no levy actually made before this cutoff date here?

Mr. Iversen: That is right, there was an assessment made in 1955 but no levy and, also, of course, with respect to 1955, also, that was only a listing of the physical property again and that never at any time have the leaseholds been listed and, of course, they are undertaking to value this property the same way that they would value other physical property in the State, which is, of course, not within the consent of Congress for the taxation of a leasehold.

I have set out in my brief a number of the statutes which trace the manner of levying taxes, and so forth. I set those out for the Court's convenience, they are rather long, I am not going to go through them. [236]

The Court: Yes, all right.

Mr. Iversen: I am simply pointing out the fact that I did set them out.

To summarize, then, your Honor, we have about three points in this case, Point Number One is that there is nothing here to which a lien can attach and, therefore, there is nothing which the County can claim in this in rem procedure because they have never assessed the leasehold and there is



no lien on the leasehold. Number Two, is that the offset has not been allowed in this case and Congress has consented to the taxation only with the offset allowed and counsel may argue that under the laws of the State of Washington there is no provision for allowing the offset, and that may be true. There may be no statute in the State of Washington allowing the offset, but if the State of Washington wanted to take advantage of the permission given by Congress to tax, then, it was incumbent upon the State of Washington to have such a law so it doesn't make any difference that the laws of the State of Washington did not conform to the Federal Act because we are operating under the consent of Congress.

Three, it does not conform to the consent of Congress if we even consider a tax upon the leasehold as allowed by Congress for the reason that Congress has allowed it only if it is a non-discriminatory tax and a tax that is on the same basis as other similar property is taxed and having met [237] none of those conditions, then, we submit, your Honor, that the County has no claim against this fund in court.

Mr. Klasen: May it please the Court, before proceeding, we would like to make certain facts clear to the Court insofar as what is actually taking place here, and I would like to sort of review our chronological proceeding to where we are today.

In 1952 the Grant County Assessor assessed this property in the identical manner in which it is assessed at the present time with the exception that

the assessment was for \$600,000.00. The Moses Lake Homes then brought an action to enjoin the Assessor from proceeding further and the result of the case was, however, that the injunctions were denied, Moses Lake Homes paid their tax on the \$600,000.00 valuation. The pertinent pleadings in that case are shown in Exhibit No. or County's No. "B", I believe, that is Grant County Case Number, the first Moses Lake Homes case.

The Court: Did that case go to the Supreme Court?

Mr. Klasen: That went to the Supreme Court, your Honor. The Moses Lake Homes felt aggrieved in that decision and the thing was dismissed without being heard on the merits. The remittitur is on file here, and there was no decision made. The appellants dismissed their own appeal.

Mr. Diamond: We cannot agree that counsel has stated those facts correctly. [238]

The Court: All right, you will have an opportunity for rebuttal.

Mr. Klasen: It says, "On stipulation of counsel, case was dismissed."

The Court: Then, in 1944, was that a tax upon the physical property rather than upon the leasehold?

Mr. Klasen: Yes, your Honor.

The Court: The same method that was followed later?

Mr. Klasen: The same method.

The Court: The same method? Yes, all right.

Mr. Klasen: And, then, in 1954 the Assessor was

again enjoined from assessing the property, and it was assessed by the same method only the tax was in the sum of \$500,000.00. The assessment in 1954 would have been to taxes to be paid in the year 1955. The temporary injunction was granted and an injunction was kept in force through all of the proceedings until December 18, 1957, at which time by order of the Supreme Court the cause was reversed.

The Court: December of '57, you say?

Mr. Klasen: Yes, your Honor, the remittitur was sent down in the case.

The Court: Yes, well, all right.

Mr. Klasen: Now, the important thing as far as the County is concerned in this case in their complaint in Exhibit "A", the second cause of action, the Assessor lists [239] this property in the same manner in which it is being assessed at the present time, or is at issue, and the Assessor was enjoined, but the Supreme Court, then, in the last decision reversed that decision and, so, therefore, the Assessor was not, the injunction was lifted and it would certainly follow, then, that the Assessor was properly assessing the property insofar as the matter is at issue here.

We feel that the State Supreme Court has upheld the present type of assessment, at least, that was the assessment in issue, a valuation of \$500,000.00 on the improvements on Government property.

The Court: I suppose it's your position that

the latest decision of the Supreme Court would be controlling, then, as to the proper method of assessing a particular kind of property in the estate?

Mr. Klasen: Well, we think, your Honor, that the decisions would have to be looked upon in the light of the facts in that particular case, that is the reason we have the pleadings and actual injunction in Exhibit "A." Now, a lot of argument has been made regarding the title to this property, that the property belongs to the United States Government. The Supreme Court in the Offutt Housing case held that even though the Government had paper title, that for taxing purposes you could go behind the naked paper title, for taxation purposes. It is interesting to note that part [240] of the argument on behalf of the Offutt Housing Company, as shown in the preface of the opinion. They contend that the assessment here was upon the Government's obligation, not upon the lessee's interest here in them. That was their contention in the Offutt Housing case, the same thing as counsel for Moses Lake Homes has contended here, but the Supreme Court, apparently, did not consider it. As a matter of fact, Grant County brought this matter of the title before the case in our amicus curiae brief. We contended in arguing amicus curiae that the matter of title constitutes ownership. The reversing does not alter that substantial beneficial and taxable ownership in this particular case, and the Court in his opinion says that:

"Labeling the Government as the owner does not foreclose us from ascertaining the nature of the

real interests created and, so, does not solve the problem."

Reading further on:

"The Government may have title but only a paper title and while it retained the controls described in the lease as a regulatory mechanism to prevent the ordinary operation of the economic forces, this does not mean that the value of the buildings and improvements should thereby be partially allocated to it."

Now, we feel that the only practical way under the decision and under the law to assess the property was to [241] place a valuation on the improvements, which is what the Grant County Assessor has done in each one of these cases. He has assessed the value of the improvements and, for all practical purposes, for taxing purposes, the fact that the Government may have paper title does not foreclose the taxation on these improvements, as if the Moses Lake Homes does not own them.

Now, we feel that this matter of interest has been pleaded before the United States Supreme Court. It has been pleaded twice before the Washington State Supreme Court and they have turned a deaf ear to it, they have held that the value, at any rate, the taxable value, is on the full value of the improvements. They say that it shouldn't make too much difference actually how they are listed, whether they are listed in the leasehold interest or in improvements on Government property, which is as stated in the detail assessment list. In any event, the decisions here hold that even though

there is a paper title, the beneficial ownership, for taxing purposes, is in the housing projects.

Now, Moses Lake Homes contends that the wrong manner of assessment is arrived at, that we should follow a method used in the Metropolitan Building cases. Those cases were, also, cited to the United States Supreme Court, as shown in here, they cited the Metropolitan Building Company versus King County—62 Wash., 609. Also, in the arguments before [242] the State Supreme Court in their briefs, in the same manner it was argued very strenuously that they were governed by the Metropolitan Building Company. leases and the Supreme Court chose not to follow that rule and merely invoked the Offutt Housing decision.

We feel, also, that they cannot complain because we have been under injunctions insofar as following the taxing procedures. Now, the Assessor has been enjoined in the Moses Lake Homes case, No. 8788, since 1954 up until this Fall. It is very evident that by taking this extraordinary relief of equity and an injunction that they, certainly, cannot turn around then and use that as a sword to point at Grant County of what we would have done had we not been enjoined. In other words, the tax would have spread on the rolls, probably, certified to the Treasurer, and, probably, gone right through the taxing process, if it hadn't been for the injunction. The duties of the officials are prescribed by statutes and I think it would have to be presumed that the officers would follow the decrees of the statute. So, we feel that they cannot complain



because of the expense of the injunction. I might, also, add that the Assessor has been under injunction of this court, I believe, and the Treasurer and the County officials insofar as proceeding further with these taxes or trying to collect or doing anything to interfere with the operation. [243]

The Court: Well, the only thing that I did, as I recall, was to enjoin the County from selling Government property. The Government had already taken title to the property by the declaration of taking. I was afraid that I might find the Court-house gone, the Federal Building, I wouldn't have any place to sit on the bench.

Mr. Klasen: The order filed, I believe, stated that possession was taken up to the first of April.

The Court: I don't believe that possession makes any difference. I believe, as I read that declaration of taking statute, it vests title in the United States. Of course, who may have possession of the Government property, they may tax it, it's Government property.

Mr. Klasen: We feel it is, and insofar as the 1959 taxes are concerned that since the Government did not take actual possession until the first of April, 1958, that there is, the taxes, the Assessor would have been able to, had there not been an injunction, to assess the property for the years 1958 for 1959 taxes.

The Court: I see, yes.

Mr. Klasen: The taxing statute, as to the cut-off date, apparently, insofar as the district is concerned, is the first of March and, also, the statute

referred to in the Cowlitz County case refers to January 1st, but insofar as we felt, I think the order did say that we are entitled to [244] take possession any time after the filing of the declaration up until the 30th or 31st of March and, in fact, they did not take possession. That the County would still have a lien for 1959 taxes.

Now, another important factor is that the County Treasurer distrained the property of the three corporations in Grant County, I believe, the latter part of January in 1958, and under the statute, of course, being a jeopardized distraint, he could, also, he could have looked forward to the 1959 taxes had not the other injunctions been issued. There were injunctions issued for Larsonaire Homes and in Larson Heights in September, 1957, for the tax years '58 and '59. In other words, there were injunctions in those cases that prohibited the County officials from acting for the years after 1950 on the taxes collected in 1959, I believe. Insofar as the taxing of Government property under lease, we feel that although they are not exactly in point the pronouncements of the United States Supreme Court in what we refer to as the Detroit cases in the State of Michigan and the City of Detroit, others were permitted to tax the use of Government property.

Now, in the cases the Supreme Court said in Detroit versus Murray Corporation in 2 Law Edition (2d), 441, in the advance sheet of March 17th that, however, the Supreme Court was not concerned with: [245].

"We were concerned only with the practical operation, not its definition or the precise form of descriptive words which may apply to it."

They were referring in the cases to the interpretation of the Michigan taxing statutes:

"Consequently, in determining whether these taxes violate the Governments' constitutional immunity we must look through form and behind labels to substance. This is, at least, as true to uphold the State tax as to strike one down. Due regard for the State's power to tax requires no less."

In other words, they go in and look at the practical side of these taxes rather than a strict interpretation.

Now, with regard to the offsets, your Honor, it is Grant County's contention that the offset is restricted to the one year in looking at the determination by the Secretary of the Air Force. It starts out the 4th of September, 1957:

"I have considered the information with respect to the subject property, the lessee of which believes that the tax for 1956 will be equal to approximately \$65,000.00."

And, then, going through here, they have apportioned these amounts and there is nothing to indicate that these amounts are for more than one year.

The Court: That tax of sixty-five thousand, however, did cover the other years, didn't it?

Mr. Klasen: Well, your Honor—

The Court: (Interposing) That is, it was a pick-up [246] of the prior years and put into 1956, but it is your position that because you were en-

joined, it should be considered as having been regularly levied and assessed in the years?

Mr. Klasen: That is right, your Honor. In other words, even the tax paid during 1955 would have been regularly on the rolls for the year 1955, were assessed in '54 on the rolls in '55 for payment. Then, there was payment of tax due in 1956 and, then, '57 and '58 to Moses Lake Homes. There is four years plus the 1959 taxes. The sum total of all those taxes, including the interest, exceeds the determination by the Secretary of the Air Force as we add them up.

Now, with regard to the determination by the Secretary of the Air Force, the statute says that these the Government, or the lessee, is to receive credit for services, for tax service customarily supplied by the County or the taxing district wherein the property exists.

The Court: Pardon me, going back to a remark you made just a moment ago, you said you thought that the taxes would exceed the amount of the designation. Would that be including 1955 through 1959? I think you have a statement of them in your brief, haven't you?

Mr. Klasen: Yes, the total amount of the taxes, including '59, is \$246,481.00, plus interest. In other words, the County is contending that on certain of these taxes and, particularly the Moses Lake Homes, where we were enjoined, [247] that the usual eight percent interest should apply to the taxes that were not paid for the length of time that they were due.

The Court: Well, all right.

Mr. Klasen: That would make a considerable interest insofar as going back to the 1955 taxes.

The offsets, the County feels, are to the point of being ridiculous insofar as they have included an item there for street lighting. It is a disputed fact but, at least, they will not admit it. We asked for it in our demand, that no place in Grant County does Grant County furnish street lighting. In other words, the statute says "as customarily applied." Now, it is hard to imagine how street lighting could be included where Grant County no place furnishes street lighting. I think that part of the difficulty arising, your Honor, is that if Larson Air Base was located within a municipality, such as a city or town, of course, the tax would have been higher. The breakdown of the millage, in addition to the regular taxes, the city and town is entitled to, I think, fifteen mills, for which they provide other services and in which street lighting may be included, but the County does not have the benefit of that millage, the County is restricted by the number of functions to, approximately, eight mills. If the property was located within a municipality, the taxes would be considerably higher, [248] for instance, Grant County does not furnish playground equipment. They have no Park Department. We feel, also, that there is no water and sewer systems. The County, by law, can't get in that type of a business. Water and sewer systems are provided for in cities and towns, but not the County government. Now, this is a tax payable to the County

because they are not a municipality and, furthermore, these items, at least, the initial construction, are properly financed by either bond issues which are over and above the regular levy, or by L. I. D. assessments, and in each of these cases there are no increased millage for bonds for this type of improvement, and, of course, L. I. D. improvements, such as for the streets, the water and sewer systems and the lights are not paid through the regular taxing covers. They are paid to the City Treasurer or to the Treasurer of the Local Improvement District. So, we feel that this is a very peculiar type of determination of customary offsets insofar as the determination is concerned.

Now, we have checked the law and we are unable to offer the Court any determination of how this should be determined, but we think that the equitable powers of the Court in a condemnation case, so far as determining interest, should be applied, unless it be shown that these services were actually customarily supplied by the County, that they should not be allowed. The County, furthermore, does not [249] concede that the Federal Government has the right to make this determination. We feel that the property is actually taxable without the express consent of Congress, that the taxing law gives authority to go behind the substance of the transaction, and in the Offutt Housing case, although there is considerable discussion relative to the consent of Congress, still they say that for the taxing purposes, that we can go behind the paper title and that the beneficial ownership of



these buildings was in the private corporation, and if the corporation then was taxable for the value of these improvements Congress, certainly, then, would not have the authority to come in and tell Grant County how they are to tax the property. The Offutt Housing case says that they are the beneficial owners and we should, therefore, be able to tax them irregardless of any consent of Congress, especially, in view of the cases previously decided involving the State of Michigan where, although they were Government property, the beneficial interest was taxed, and that being the case in this case, in the Michigan case, there was involved no question of the consent of Congress. Because of the use made of the property, the Supreme Court held that the property was taxable, so, therefore, we say that regardless of the consent of Congress that the property was still taxable.

Now, insofar as the State Supreme Court is concerned with the interpretation of the housing of this project, the [250] '51 Washington Decision case in upholding the Offutt Housing case, they certainly did not rule out the fact that the property was otherwise taxable. In other words, they had to post a lien on it and the Judge said, well, they would just follow the Offutt Housing case, but it would not eliminate the other type of taxing. So, therefore, since the property is taxable the Government has no authority to come in and say how we are to tax it. I would concede, your Honor, that if it depends on the consent of Congress to tax the property, then, of course, Congress could take away

or give whatever consent they deem necessary. However, the Act under which the setoffs were allowed specifically gave consent for the taxing. In other words, the theory under which the offsets were to be applied would be for the County to go in and tax the full value; that the statute removed any prohibition that might have remained with regard to the Offutt Housing case and allowed them to tax the full value.

Then, we feel Congress said, "Well, if we are not going to allow them to pay double tax, if certain rights are furnished, then they should be entitled to an offset." But insofar as the offset is concerned, we think that should be strictly construed insofar as the customary services are supplied. We feel that it is unfair for the lessees to take advantage of the larger amount paid to the schools. That is one of the larger items in the determination, the amount paid [251] under Public Law 874. As a matter of fact, every school district in Grant County receives benefits under that statute and where other tax districts are not entitled to offset because of the grant from the Federal Government since they are not customarily entitled to offset it, then, we don't feel that the housing project should be allowed to offset it. In other words, if it strictly limited the benefits to Grant County, this particular district were strictly limited to the funds from Public Law 874, that would be a different question.

Without prolonging this argument any longer, your Honor, we feel that this matter has been argued and argued and argued before the State Su-

preme Court and the United States Supreme Court. They have ruled that the property may be taxed at the full value and the same arguments were presented, most of the same arguments were presented to the State Supreme Court, but insofar as the actual facts are concerned the Assessor in the 1954 case listed the property exactly as it listed it at the present time. The injunction was granted temporarily restraining them, the Supreme Court overruled that injunction and reversed it. We feel that they should not be allowed to complain at the present time that they are not following the proper taxing procedures. We feel that, in all equity, that Grant County is entitled to the taxes prayed for.

One thing, your Honor, that was brought out in the [252] argument, and that was the interest being condemned by the Federal Government. A copy of the pleadings that I have shows that the property shall be subject, however, "to a certain mortgage dated June 3rd, 1950, executed by Moses Lake Homes, a Washington corporation, to the National Bank of Commerce of Seattle", and I think that allegation pertains to Larsonaire Homes and Larson Heights insofar as accepting our mortgage.

So, actually, while they come in and contend that they have a very small interest in this matter, they, certainly, had an interest that was such that would guarantee the payment of mortgages exceeding six million dollars. And the assessment procedures followed by the County Auditor, certainly, not the Auditor, but by the Assessor, are prescribed by statute. He is given the opportunity to list omitted

properties and put them on the roll, and the procedures, we feel, have been correctly followed, the respondents, or the housing authorities certainly can't complain because of their own injunctive procedures that we haven't done it in another manner. Now, I don't know how they contend that we should have done it. The assessment rolls were made, then, the property was added, and then the injunction was placed against the Treasurer and the officials, but, certainly, the procedures were followed in substantial compliance with the statutes.

The Court: I will take a ten-minute recess.

(Whereupon, a recess was taken for a period of ten minutes.)

The Court: All right.

Mr. Klasen: If it please the Court, this isn't marked, if the Clerk would mark it? I showed it to Mr. Iversen. It shows the detailed assessment list for the years '54 to '58 on Moses Lake Homes, for whatever assistance it might be to the Court.

The Court: It should be admitted, if you wish, you may have the record show an objection, if you wish, Mr. Iversen.

Mr. Iversen: No objection.

The Court: And whatever other documents that have been advanced here, I don't know whether I formally admitted them, but they should be in.

Clerk of the Court: I will mark them all admitted, then.

Mr. Iversen: I have found in taking an appeal it sometimes gets rather awkward because matters that are before the Court by the way of requests

for admissions don't appear as exhibits and they don't get in the Statement of Facts, they are just in the transcript. Now, that is a problem we run into in the State court, I don't know whether we run into them in the Federal court or not. It might [254] be worthwhile marking as exhibits all the various documents attached to admissions, so that if there is an appeal taken, they will be in.

(Whereupon, all documents attached to admissions were admitted in evidence.)

Clerk of the Court: Your Honor, the exhibits don't go in the Statement of Facts, they would be in the Clerk's transcript.

The Court: I don't think you would have that trouble here because they go into the Clerk's transcript and all you do is be sure you designate them in your statement to the Clerk of what matters you wish to be included in the transcript. I have devoted the day to this, so long as I get an early dinner, it is all right.

Mr. Iversen: Counsel have offered in evidence certified copies of this proceeding which went to the Supreme Court and, then, was dismissed upon stipulation. Now, I think it isn't quite as fair a picture of what occurred there just from what is there. The matter was dismissed on stipulation and while counsel went outside the record to say that the tax in 1952 was levied on the physical property. The tax in '53 was not, it was on the leasehold and we paid it. We arrived at a kind of a compromise settlement by which we thought we would pay the '53 tax and dismiss the case and go on. [255] Now,

that is outside the record, as long as we have got something outside the record, we might as well complete it. I don't think there is any real materiality to that matter of the appeal to the Supreme Court that was dismissed. Now, on the cases that were before the Supreme Court no issue was raised as to the manner of assessment. There just wasn't anything set up there about whether they had assessed the leasehold or assessed the physical property, and the Supreme Court assumed that they had assessed the leasehold and that is what they said in this case in 151 Wn. Dec., note what the Supreme Court said:

"We followed the Offutt case and hold that the value of respondent's leasehold at the nominal rent reserved is the full value of the buildings and improvements."

Now, that is what the Supreme Court is assuming that they were assessing and that is what the Supreme Court was talking about, is the value of the leasehold interest. The point simply wasn't raised so that the Supreme Court has not passed upon that. The Supreme Court has expressly held there they recognize its leasehold interest, and in the sales tax case the Court expressly said that the Government owned the improvements on the property.

Now, as to the question of whether or not the Supreme Court of Washington reversed the Metropolitan cases, in the Moses Lake case they certainly did not. This case applies [256] only to Wherry housing cases. Note what they said:



"We followed the Offutt case as to the full value of the buildings and improvements. We do this because the Supreme Court of the United States is the final authority on the Federal Government's waiver of immunity from State and local taxation and because of the desirability of universal benefit among the several states where the housing projects are located."

Now, that is all the Court was talking about, is Wherry housing projects, and in addition to that the Supreme Court could not reverse the Legislature of the State of Washington. The Legislature says, in Section 84.40.030 R. C. W.:

"Taxable leasehold estates shall be valued at such price as they would bring at a fair sale for a cash price."

So that the Legislature is in accord with the leasehold cases. So that the law of the State of Washington as to all other leased property on publicly-owned land comes from the law with respect to Wherry housing projects. The law, as declared by the Legislature and the Supreme Court of the State of Washington, and that is the law of the State, discriminates as to a Wherry housing project and, consequently, does not tax Wherry housing projects on the same basis as other similar property, as the permissive statute of Congress. It specifies that it must. Now, it was specifically [257] held that the value of the leasehold was the same as the value of the property in that case and that is all the leasehold that they were talking about. Now, the point that we can make, counsel says

that in the Offutt case the Supreme Court had the Metropolitan Building Company cases cited to it. That is right, and there is a conflict of authority throughout the country as to the method of evaluating leaseholds for tax purposes. Washington has taken one method and that is the method that is followed in the Metropolitan Building Company cases and the Court in the first of the cases, if your Honor will read it, will see that the Court says, "That we elect to follow a different line of decisions than some of the other states have followed." Washington has adopted that line of authority. The Supreme Court of the United States in the Offutt case adopted another line of authority and, then, came along and said that "you must tax on the same basis for a Wherry housing project as you tax other property." So that the Washington Supreme Court in blindly following the Offutt case, which applied in a Nebraska situation, applied to Wherry housing projects a wholly different method of taxation than they applied to any other similar property, and that is the sort of thing that Congress was doing something about when they enacted this permissive statute. So that it doesn't matter that the Supreme Court of the United States rejected the Metropolitan Building [258] Company cases, in the Offutt case, they were simply following the other line of authority in the method of evaluating leasehold. The fact is that the State of Washington is taxing Wherry housing projects differently than other similar property.

Now, going back again to the matter of 1959 taxes

I should, perhaps, have emphasized a little more what our Supreme Court has said about when taxes can become a lien and while our State statute says that taxes become a lien as of January 1st in the year in which they are assessed the Supreme Court of the State of Washington in the case of Puget Sound Power & Light Company versus Cowlitz County, that is that same case we have talked about before, 38 Wash., 907, expressly held that that applies only after all of the proceedings have been had, and they said on Page 913:

"Under these circumstances neither may the Legislature override it by enacting lien laws nor may the Court do so, that the tax lien, ex necessity, warrants a defiance of the Constitution by any of the three coordinate branches of the Legislature."

This is on Page 916:

"We hold that the exemption from taxation granted in the Fourteenth Amendment to the State Constitution applies with equal force to both real and personal property, and since there can be no valid tax, since there has been a levy and since title to the operating properties involved in this case passed to the several communal corporations [259] prior to the date of the levy, these properties were not subject to 1949 taxes."

And, then, in reviewing the facts in the case it will appear that it indicates this case involved several different acquisitions. It occurred in May, two of them in May, and two of them in September, and the levy occurred in October, so that even though the tax relates back to January 1st, it does

not relate back unless all the proceedings were had before the property was acquired by the public authorities, so that, certainly, insofar as 1959 taxes are concerned there could be no possibility of its being collectible here under the decisions of the State, because no levy has been made prior to the acquisition by the Federal Government, and that case is directly in point on the 1959 taxes.

. Now, while counsel says they might have had a jeopardy distraint, they did not have a jeopardy distraint and there was no situation involving jeopardy distraint law, nobody about to take this property out of the State, and even if there could have been a jeopardy distraint there was not, and that case was directly in point on this proposition.

Insofar as the determination is concerned made by the Secretary of the Air Force or his representative about the time that it applied to, it would be noted that the provision that counsel referred to where they recite the amount [260] due in 1956 does not purport to say what they make this determination for, that is simply a recital in here that the Assessor believes that the tax for 1956 will equal approximately \$65,000.00. That is just the recital at the beginning of it, that is simply a method of indicating something about the magnitude of about what they are talking about here and there is nothing in that determination that states that it is for any particular year.

Now, counsel says that in determining the amount due they would include the interest on the taxes from the time when they would properly become

due, but that isn't the law of the State of Washington. These properties were taxed under Section 84.40.030 R. C. W., which relates to listing admitted property to improvements. It will be noted that in our request for admissions we reproduced not only the front side but the back side of the detail assessment list and on the back side will be found the statement on each one of them:

"The above-mentioned property consisted of 200 dwelling units."

Now, there is a similar provision. I think, on each of them on the back side so that that shows that they were assessed under this provision. Now, note what this provision says after saying that they can pick them up, and so forth, which we have already read, they go on and say: [26I]

"Provided that such assessments"

Let's see:

"The Assessor, on his own motion, or upon the application of any taxpayer shall enter upon the detailed assessment list of the current year any property shown to have been omitted from the assessment list of the preceding year. Or, if not, then, valued at the valuation as the Assessor determined from such preceding year. The improvements have not been valued and assessed as part of the real property upon which the same has been located as evidenced by the assessment rolls and may be separately valued, providing no such assessment shall be made more than three years preceding the date when such improvements were valued and assessed."

Oh, here is the section I intended to read:

"When such omitted assessment is made the taxes levied thereon may be paid from one year within the due date from which the assessment is made without the levy of any penalty or interest."

These were picked up under that statute and the statute expressly provides that interest shall not accrue, because these were picked up under that statute.

Now, counsel has attempted to make something of the fact that there was an injunction in fact, that they didn't attempt to make other levies while the injunction was in effect: Now, that works two ways, if you are talking about an [262] equitable proposition, in the first place, we had a right to protect ourselves by not going to court. But had the injunction not been in effect and had the tax actually been levied against us, under the terms of our lease we had the right to increase our rents and pay for those costs of operation, and had the injunction not been in effect and had they actually levied and made us pay the taxes currently as they accrued, we wouldn't have been paying it, that is, these defendants wouldn't have been paying it. It would have been paid by the occupants of the houses and the Government would have raised the rent. As it is now, if we are required to pay this it comes out of the pockets of these three corporations, which wasn't what was contemplated at all. So, so far as the equities are concerned, it works both ways and we simply say that under the law they could not, they are bound by exactly what



they did. They assessed this property under the omitted property statute and they assessed it all for the year for which the determination offset was made.

Now, insofar as counsel's argument is concerned about the millage, counsel says there is no millage in Grant County that would have covered the benefits that might have been conferred by a municipality, such as playgrounds and street lighting and those things. Now, of course, that is a thing with which a Federal statute is not particularly concerned. In order to take advantage of the Federal permissive statute [263] for the taxation of property it would be incumbent upon the State to adjust its laws and its millages and whatever might be necessary, if it deems it important enough to take advantage of that. The State hasn't done anything about taking advantage of this procedure, the State could have provided some kind of a millage or something else. The fact that Grant County, itself, does not furnish some of these facilities which a municipal corporation furnishes is, really, immaterial, actually, in this case the Federal Government was, really, furnishing urban facilities on this Base, and having furnished urban facilities on the Base such as lighting and streets and all those things, it was within the proper discretion of Congress and the Secretary of the Air Force to provide that a credit should be given for those things. At any rate, Congress did authorize the Secretary of the Air Force to make a determination and the Secretary of the Air Force did

make a determination and we cannot in a collateral proceeding of this kind attack that determination, it is certainly not an unreasonable determination.

. Now, we simply say in this case that this is an ~~action in rem~~, an action in rem could apply, that the County could claim something, against the res only if it had a lien and had an interest in the res. The res is a leasehold, it has no interest in it by the statute that I have cited. The lien does not attach unless it was listed and assessed, the [264] leasehold has never been listed and assessed. There has been no merger of ownership. The Government owns it, certainly, the Government is not undertaking to condemn and pay off the six million dollars, for, at least, we don't think they are in this case, they don't pay six million dollars for the valuation here. All the Government is condemning from us in taking is the leasehold. There is no tax that has ever been levied and no lien against the leasehold in this case, we have been given no credit for the offset, and that is the only method by which the Government has consented to the tax and we have been taxed by the State of Washington on a basis wholly different from the method in which other similar property is taxed and, therefore, it does not comply with the commission of Congress.

#### Oral Opinion of the Court

The Court: Well, I think these cases involve, basically, a matter of statutory construction, the construction of the Act of Congress which amended the Housing Act in Section 511 of the Housing

Act of 1956. What I think hasn't been sufficiently appreciated or, at least, emphasized here by the Counties is that Offutt Housing Company case that went to the Supreme Court of the United States and the Moses Lake Homes against Grant County decided by the Supreme Court of the State of Washington, which expressly followed and was patterned upon the Offutt case, were both decided before Section [265] 511 was enacted and as the excerpts from the Congressional hearings which have been set out in Mr. Cheadle's brief, I think, clearly show that Congress definitely had it in mind and said that they had it in mind, claiming the Federal statutes with reference to taxation of these housing projects on Government bases, to meet the holding and the decision in the Offutt case. The Offutt case assumed and was based upon the assumption that Congress had granted authority for the counties and local municipalities, for local units, to tax the property under this pattern of furnishing housing on the bases where the Government acquired the property, leased it to private corporations on long-term leases and the private corporations, then, proceeded to build the housing and put in the furnishings in order to serve the service men on the base. The Offutt case assumed that the Congress had given consent to taxation of the leasehold property of the lessee. Congress then said, we will not circumstantially conclude here that Congress, although, they had the power to do so, didn't entirely immunize the property from taxation. They said, "Well, we will permit the local

political units, or counties, to tax this property, but it should be taxed only on certain conditions."

In other words, they conditionally, or they let the counties have the power to tax but, conditionally, upon complying with the conditions which were set out in the statute. Now, it has been argued here, and that is one of the, at [266] least, so far as Spokane County concerned, there seems to be a reliance of the county on the fact that Congress didn't have the power to withhold, even conditionally withhold, this property of the lessee from taxation, and if they didn't have the power to afford it immunities from taxes they didn't have any power to put conditions upon its taxation by the county. I don't believe that the circumstances as to whether this property was acquired by purchase and condemnation or by the arrangements with the states through a legislative enactment is at all material. I think that the power which has been recognized here to immunize this property from taxation is upon an entirely different basis than whether or not the state and the United States have concurrent jurisdiction over these military bases or a military reservation. As I read the Supreme Court cases, it is a power which Congress has under the Constitution of the United States to protect its agencies from the burden of state taxation where it is in the interest of policies and programs of the Federal Government to deny the power of taxation to the states.

In the case of the housing program, of course,

the principal purpose was to afford adequate and proper housing for military personnel on a low-cost basis and, of course, whether or not the subject of taxation is vitally important, as Mr. Iversen has pointed out, under a program of this sort, inevitably, the taxes are paid by the military personnel, by [267] the tenants, in the final analysis, and in order to avoid that it is very much in the public interest to have the taxes, at least, minimized to the extent of giving credit for the benefits which the counties get from contributions made or improvements made by the lessees, and I think it's on that basis that, as I would state it, that immunity from taxation may be created by Congress in connection with the carrying out of United States Government programs and policies and may be extended to persons with whom the Government has authorized contracts for the furtherance of such programs and policies, and that is the power, I think, is the power, and the Court, the Supreme Court, has recognized that it may be extended not only to Government property but to people whom the Government has contracts with in the furtherance and carrying out of Government policies as set up and authorized and provided for by Congress, so that I think here Congress was acting within the scope of its authority when it provided these conditions which must be complied with before valid taxes may be imposed upon the property of the lessees in these housing programs.

Now, insofar as the Spokane County case is concerned the condition there is that they must not



exceed what the Secretary of Defense finds to be a proper offset, or proper amount, to consider in the way of benefits conferred upon the county, or upon the people, the taxpayers, of the county, by [268] reason of these various things that are enumerated in the way of improvements or contributions by the local taxing units, and in the case of Spokane County, I think without any question, the amount of the determination very substantially exceeds the amount of the taxes in each of the years.

Now, there hasn't been so much question about the propriety of the items, I think there was some question raised about it in the Spokane County case and I should, probably, say the Fairchild Air Base case, they designated them that way, but I don't know, I suppose that the Court has a res before it, it has the power to determine what shall be done regarding it within the scope of its powers and jurisdictions, and under that theory I might, I suppose, have jurisdiction to make this determination, since I have the United States here, but, probably, that it was the intent of Congress that this determination by the Secretary of Defense should be subject to judicial review. I think it's a part of the condition that if you want to tax this property, you can tax it but you have got to take what the Secretary of Defense says is a proper offset for these various elements enumerated in the statute and the Congress could, as has been pointed out, could have provided that you may tax this value but you may tax it only a fourth of its value, or half of its value, and they can say half of its



value as found ~~or~~ determined by the Secretary of Defense, and in the absence, certainly, of action [269] without the scope of the authority conferred, or improper delegation of authority, or in the absence of, certainly, arbitrary or capricious action, I don't think that I would have any authority to review the determination and finding made by the Secretary of Defense, but in both these cases I am unable to say that there has been an arbitrary or capricious action on the part of the one to whom the Secretary of Defense has delegated this power of making the determination through the various chains of command.

Now, just one other point, I think here in the Spokane County case, and that applies to the taxes for the year 1956, I am inclined to think, without going into detail, but upon the basis of the argument made here, both by Mr. Iversen and Mr. Cheadle, that the Washington statutes and the Washington decisions, I think, as I view them, are to the effect that in this situation where the applying of immunity from taxation or conditional immunity or partial immunity, where the property is to be taken over by the United States or by one with whom it contracts under circumstances where there may be or shall be partial immunity from taxation, I think that the tax does not become a lien upon the property until the levy has been made by the Board of County Commissioners. I don't think that the provision for relating back the lien, the statutory provision for relating back the lien, to the time of assessment applies here under the

construction placed upon the [270] statute by the Supreme Court of the State in this sort of situation, and, so, I think here that the lien would not apply until, I should think, it would be about October when the County Commissioners actually compute the basis on which the levy is to be made, the percentage that is to be applied, or the millage that is to be applied to the valuations, as fixed by the County, or as found by the County Assessor and equalized by the Board.

Now, all those things, I think, apply to the Grant County case, except that there are special issues raised in the Grant County case. I am quite impressed by the argument of Mr. Iversen, and I think it does appear here that the assessment is made on the houses and contents rather than on the leasehold. That seems to be quite clear, but I am inclined to think that on that particular point that since this method of assessment went to the Supreme Court and the injunction was dissolved and the case reversed that while that point may not have been stressed or particularly called or directly called to the attention of the Court, I think that it could be construed as an approval, at least, in this situation, of a Wherry Housing Act case, an approval by the Supreme Court of the State that this method of making the assessment and the levy of taxation was an acceptable one and, of course, the Supreme Court of the State is the one to pass upon the statutes of the State rather than this Court or any other Federal [271] Court. I don't see how, however, on that theory that you can get

around the proposition that this is not the acceptable method under the statutes and decisions of the State Supreme Court, is not the proper method of assessing leaseholds and, of course, the Section 511 of the Housing Act of 1956 contains the condition:

"That the taxes levied upon the lessee's interest in the project in this Housing Project, must not be discriminatory"

that is to say, must be on a comparable basis that is used and applied on similar property and, of course, you have here a leasehold, and both the statute and, I think, the Metropolitan cases, which have not been overruled, I don't believe you can say they have been overruled, by the Wherry case decisions of the Supreme Court, because, as Mr. Iversen has pointed out, they were based on the Offutt case and were clearly to apply only to Wherry cases, but I think that the method of assessing leaseholds is to be gathered from the statutes of the State and the Metropolitan cases, which you know, the Metropolitan Building cases, which is that the leasehold shall be assessed at its market value as the price that it would bring if it were sold by a seller willing to sell to a buyer willing to purchase with all of its benefits and all of its burdens and here this assessment has been made and could only be justified as not being an assessment on the leasehold on the [272] grounds that it is an assessment of the leasehold based upon the value of the leasehold, itself, so that I think that there has been here, in the Grant County case, a basis of assessment used, if it is acceptable, and

it could only be acceptable if it is taken as an assessment on the leasehold, in effect, but it is on the basis of the value, as I understand it here, the record shows, on the basis of the value of the houses and contents rather than on the value of the leasehold on the formula that I have stated here, set up by the statutes and decisions of the State Supreme Court.

What I have said, I think, about the time when the lien attaches would bar the collection from this fund of the 1958 taxes, that is, taxes to be collected in 1959, and I don't think that under the circumstances here that a county is entitled to interest except as interest is provided for in the omitted property statute as it has been cited here and discussed by Mr. Iversen.

Now, this matter of injunction, whatever may be the reason here, these assessments were made for the year 1956 on the basis and following the statute which provides for picking up omitted property, and it was assessed and put in as of that year and, certainly, it seems to me that if we are going to say, "Well, this should be spread out over the prior years and considered taxes in those years" then you should apply the same rule to the determination because the determination [273] was made all at the same time that the one assessment and levy of taxes was made and the Secretary of Defense, certainly, would have had no basis for making a determination in those prior years after that date because there wasn't anything to determine, there were not any taxes to consider, so that if the

County is to be given the privilege of spreading these taxes, in effect, or theory, then, I think that, in fairness, you should consider the determination as spread over the same period. So that the determination of the Court here will be in each case that there is not a valid tax lien, either by the Spokane County case, in one case, and Grant County in the other, against this fund and that the fund may be distributed to the defendants' lessees in the condemnation case entitled thereto, and I assume that there isn't any conflict between the various parties here as to the division of property. There is a mortgage, I think, in the Spokane County case?

Mr. Cheadle: There is no one who lays any claim to the funds, your Honor, excepting Spokane County, other than Air Base Housing, Inc.

The Court: Oh, I see.

Mr. Cheadle: In fact, we have photostatic copies of the agreement between the Air Force Federal Housing Administration and the mortgagee, whereby the mortgagee has accepted substitution of the United States. [274]

The Court: I assume that counsel should be able to make out findings, I assume you will have findings and an order based on the findings and conclusions on the facts as developed here by the stipulation and by admissions and so on and the documentary proof.

Mr. Diamond: May I inquire how long the Court will be in attendance? I understood you would be away next week so that we couldn't get an order

entered. I was wondering if it would be possible to present an order within the next few days?

The Court: I will be here until the afternoon of the 3rd of July. Did you have something more, Mr. Diamond?

Mr. Diamond: I was going to ask would the Court set a time on July 3rd when we could present the findings and judgment so that we could get it done at that time?

The Court: Well there is some conflict here, some difference, I think, between the general civil rules and our local rules as to the method of settling findings of fact, and we have an amendment, we haven't got them printed yet, but we are just about ready to get some amended rules out to follow the civil rules and, in practice, I have been following them, usually, that is, I simply enter findings of fact and the conclusions, if they seem to be all right, and the party presents them and then gives them to the other party, they have ten days in which to propose amendments, but here I think in view of the fact that I don't intend to be here after the Fourth [275] of July, except on an occasion or two during the summer, and the time element is important, I think it might be all right if it is acceptable to counsel, to fix a definite date for the settlement of findings of fact and, then, if you wish, each party may put in his own proposals and we can meet here and settle them and the Court could either adopt one or the other or something in between.

Mr. Klasen: I would like to suggest July 3rd.



Pardon me, if your Honor pleases, I wasn't quite clear as to the Court's decision regarding the '54 and '55 taxes. Is it still retroactive so far as offset provisions of the tax, so far as those taxes before the 511 Section was passed?

The Court: Yes, let's see, the rule of the Offutt case is applicable to taxes which became a lien, as I understand, prior to June 15, 1956. Of course, the provision as to discrimination wouldn't apply and I should think, under my ruling here, you would be entitled to any tax that became due.

Mr. Iversen: These did not become a lien because they have not been levied.

The Court: Yes, I knew I had something in mind there. I think that we have to treat these taxes the way the counties treated them, and that, being this was one of the prior years, wasn't it put in as an omitted year in 1956?

Mr. Iversen: I think it was. [276]

Mr. Klasen: It was omitted, after the injunction was released, to go back to the years 1954 and '55. Those taxes should be, they were for the year '55, well, the assessments were '54 and '55. Now, those got back to the time, actually, which would be governed by the Offutt case before the other decision. In other words, the County was enjoined at that time from doing anything before even these offsets, substantially, became applicable.

The Court: Yes, I understand that, but the levy, actually, wasn't made until after June 15, 1956, was it?

Mr. Klasen: But do I understand the Court's

ruling, then, that the offsets are to apply to years prior, to years prior to '56?

The Court: Well, it depends on what you mean by "years prior to 1956". As I understand it, if my construction of the statute is correct, that this amendment of the statute doesn't apply to taxes that became a lien prior to June 15, 1956, and in the case of your 1954-'55 taxes, whichever you want to call them here, they were not actually levied until after that date, were they, isn't that correct?

Mr. Klasen: No, they go to that roll. They are affected by the same type of a matter. We would like to present further argument if there is any question of the Court on those years, at least, before the statute became in effect. [277]

The Court: Well, did you have more than one year?

Mr. Klasen: Well, there would be taxes assessed in '54 and '55 and I think the deadline was May 30th as to a lien, that is where we came out on top in the first case.

The Court: When you say "1954 and '55", you mean taxes assessed in that year?

Mr. Klasen: Yes, those are the years.

The Court: I see, well, you had the two years, then, '54 and '55, which would be before the deadline dates?

Mr. Klasen: I believe so, your Honor.

The Court: Well, I will hear you further on that, if you wish to present it now or at the time we present the findings.

Mr. Klasen: I would rather have more time to prepare it.

The Court: I think it would be largely, it seems to me, to depend on which one you have definitely in mind, now, depending upon the provisions of the statutes of the State, which provide for picking up prior omitted years, as to when the lien would attach. I don't feel that I could, without statutory authority, just say as a matter of broad general equity and, of course, there are equities both ways, as Mr. Iversen pointed out here, but I don't think just as a matter of equity, aside from statutory authority, I could just say just because there was a levy in those years, I am going to [278] say that there was a levy assessed and a levy attached in prior years, but I think that is a matter, in fairness to the Counties, that should be considered again at the time the findings are settled. I have no objection to the 3rd, except I want to drive to Pasco that afternoon. I don't want to get caught in any overtime session on the 3rd, at ten o'clock in the morning, and I would suggest that the prevailing parties here make up a proposed set in each case of findings and conclusions, an order or judgment, or whatever you call it, and serve copies on counsel, at least, three days before.

Mr. Iversen: I don't think we are going to have that many days.

Mr. Diamond: As soon as we can.

The Court: As soon as you can and before the day of the hearing, certainly, and then we can

come in or you can come in with counter-proposals, if you see fit.

Mr. Cheadle: Is that time set for the Fairchild case as well as the Larson? It is my thought that we might save the Court's and out of town counsels' time should the Counties and we be in agreement and our proposed findings accord with the Court's opinion, that they might be presented earlier.

The Court: Yes, I think it's certainly more clear-cut, the Spokane County case, and I shouldn't think that you would have difficulty in agreeing on findings. If you can, why, it isn't necessary for you to come here. Let's see, is Mr. Olson [279] here? What would you prefer on that, Mr. Olson, or we can just follow the general civil rules here and have Mr. Cheadle prepare these findings and give you copies of them. If they look all right to me, then, I will sign them and then you would have ten days in which to object and make counter-proposals.

Mr. Olson: I think that we can reach an agreement on the findings before then, if Mr. Cheadle will present them to me in a day or two.

The Court: Yes, all right. Well, you need not come, then, if you can reach an agreement, and I think, particularly, in the Spokane County case that if there is error in my rulings here, or, I won't put it that way, if the higher court considers that there be a question of law rather than a question of fact, I think, certainly, that will be determinative of it.

Oh, another thing, I had in mind mentioning

here, I think I spoke about it at the outset of the hearing here, I have in mind making this a final order under Rule 54B of the Rules of Civil Procedure and, by the way, I think, under Rule 71A is a special rule that applies to condemnation cases in Federal Court, but all other rules apply, also.

"When more than one claim for relief is presented in an action, whether it is a claim, counterclaim, cross-claim or third party claim, the Court may direct the entry of a final judgment [280] upon one or more or less than all of the claims only upon an express determination that there is no just reason for delay and upon express direction for the entry of judgment: In the absence of such determination and direction any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action on any of the claims, and the order or other decision is subject to revision at any time and to the order and judgment adjudicating all of the claims."

Now, I should think that this is a case that would apply, I don't want to make that as dogmatic or anything of that sort, if counsel thinks that it shouldn't be attempted, why that is all right, but I would recommend that you take a good look at them, and the decisions under them, and see if you think it is appropriate and proper to follow that procedure. I think there is a Ninth Circuit case, I haven't the citation here, Judge McLaughlin, I think, wrote the opinion, but I think it is wrong, it holds that it doesn't apply to multiple parties

but only to multiple claims. I think in some of the other Circuits they have held it applies to multiple parties as well as to multiple claims. It seems to me that here you might be able to invoke that provision, but I just suggest that you take a good look at it at this time, is all.

The court will adjourn until nine-thirty o'clock a.m. on July 2nd. [281]

(Whereupon, court was adjourned until 9:30 o'clock a.m. on July 2nd, 1958.)

Spokane, Washington, Thursday, July 3rd, 1958,  
10:00 o'clock a.m.

(Whereupon, the trial in the instant cause was resumed pursuant to adjournment, all parties ~~being~~ present as before and the following proceedings were had, to-wit:)

The Court: I think this was the day we were to endeavor to settle the findings of fact and conclusions of law and judgment in Case No. 1667, the United States against Certain interested land and Moses Lake Homes, and others. It doesn't seem to me that it would serve any useful purpose in view of the time that was spent in arguing this before. I think this was argued all day long and briefs have been submitted, not only in this but in the companion case here in Spokane County. Already the findings have been settled and signed, the findings and conclusions and judgment, in the other case, and I think that the Court at this time will not ask for re-argument of any of these questions,



except the one that I will mention in a moment, but simply confine ourselves to seeing that the findings and conclusions express the decision of the Court which was made and announced at the prior hearing.

The one exception to that is that I didn't finally [282] decide what to do about the 1955 taxes on Moses Lake Homes, and I think an orderly way to proceed here may be to hear you on that, first, and decide what we are going to do about it, and then take up the matter of the wording of the findings and conclusions, and I might point out here that under the Federal practice, this isn't so important, the form of the findings, as it would be in the State practice, or what the State practice used to be, at any rate, because it is not necessary for a party in Federal Court to make any proposals or take any exceptions or suggest any amendments to the findings in order to fully preserve his rights on appeal. You don't have to have a set of amendments presented and then have the Court, say, reject it and initial it, and so on, as I read the rules, that isn't necessary at all. If you disagree with the Court's findings and the evidence does not sustain them, you have a right to raise that point on appeal in the Court of Appeals, or if the Court has come to a wrong conclusion from the findings which ~~it~~ has made.

Now, I have your or, at least, I say "your" brief, the brief of Lycette, Diamond & Sylvester, on the 1955 tax and, perhaps, I should hear you regarding that, Mr. Klasen, first, and then permit Mr. Iver-

sen, you represent the defendant on that point; too, I presume here?

Mr. Iversen: Yes.

The Court: Mr. Diamond isn't coming today.

Mr. Iversen: No.

The Court: I see.

Mr. Klasen: If it please the Court, the position of Grant County in this matter was that were it not for the injunction issued in the Moses Lake Homes case the taxing procedure would have followed through and the taxes would have taken their normal course, would it not have been for the injunction.

The Court: I don't know whether this will help at all, but it might, but it seems to me that this is a question of whether the Court is going to give a strict and literal construction of the statutes here regarding the inclusion of omitted property and the inclusion date here of June 15, 1956, was it, when the amendment of the Housing Act became effective? If you take a strict and literal view of it, they were not a lien prior to that time. The question is whether the Court should do that, or to take a more liberal view and to regard the overall equities and say that, really, in substance, whatever may have been the effect of, technically, this omitted property statute, that they were taxes for a prior year which should have come in under the prior law and not under the amendment, which didn't become effective until 1956, so, I think that is the thing the Court has to decide.

Mr. Klasen: Of course, if the Court please, as

the County interprets the Section 511, that Section does not preclude [284] the County because the taxes have not become a lien, maybe, on a technical basis. It would be more convenient if the Court had a copy.

The Court: What is the wording of that?

Mr. Klasen: Well, in the particular section it is provided that no such taxes or assessments not paid or encumbering such property or interest prior to June 15, 1956.

The Court: Yes.

Mr. Klasen: Now, the construction of that phrase, it says:

"Provided that no such taxes or assessments" and, then, in parentheses:

"(not paid or encumbering)"

Now, that is the first thing, the question of those taxes not paid or encumbering such property or interest prior to June 15, 1956. Now, when Mr. Powers, the County Assessor, put the taxes on the roll after the injunction was reversed by the State Supreme Court, it was put on by virtue of the omitted property statute, and although it is on the taxes for the current year, it still expressly sets out that these taxes are for prior years' omitted property. In other words, you can go back three years, the statute provides for three years, you can have three years all at once. Well, now, the interpretation of the County and, at least, so far as this [285] statute reads:

"Provided, that not paid"

we feel is one of the crucial words

"not paid or encumbering"

it doesn't say

"not paid or encumbering"

or

"taxes encumbering the property."

The statute says

"Not paid on such property for interest prior to June 15, 1956."

Of course, that is what the assessment is for, is on the interest of Moses Lake Homes prior, well, beginning in 1954, as I mentioned to the Court, the two years there, it's actually a tax on their interest for those years prior to June, 1956, and, so, the fact that even assuming—

The Court: (interposing) You placed this significance on the disjunctive phrasing there

"not paid or encumbering"

that, since these were not paid, they come within the statute?

Mr. Klasen: That is right, your Honor, that is the County's position, that even assuming because of the injunction there was no lien, still the taxes were not paid and the County, then, properly assessed those taxes by virtue of the [286] statute for the prior years and, that being the case, we feel that the County has a right to tax for those, that portion prior to the effective date in the proviso. Along with that, anyway, the Housing Act, the Section 511, of course, the first part, the preamble says:

"Nothing shall be construed to prevent the taxes."

In other words, nothing contained in the provisions of this title or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee, and I would say that this does not mean a leasehold interest, not necessarily mean a leasehold interest, as stated by Mr. Iversen. It could very well be construed the interest of Moses Lake Homes:

"in or with respect to any property covered by the mortgage."

And, of course, then, the other six million dollar mortgage, almost a total of six million dollars in mortgages, and, so, for those years in which the taxes were not paid and which Moses Lake Homes had an interest, certainly, under that construction of the statute the County would be entitled to the taxes notwithstanding any theory on this Cowlitz County case in 38 Washington.

In addition, there is found very little law as far as injunctions are concerned, but there is this in 43 C. J. S. "Injunction", Section 309: [287]

"That the allowance of damages should rest on equitable principles and as a general rule should be damages only as were actually sustained by reason of the injunction."

It is referring to damages as a result of an injunction which was later removed:

"And that such damages as are a necessary, actual and proximate result of the injunction during the time it was operative."

The Court: By the way, pardon me, of course, that isn't before me here, but I suppose a bond or

bonds were put up, were they not, on these injunctions?

Mr. Klasen: For the temporary injunction pending the outcome of the trial, there was a bond and, of course, when the permanent injunction was granted there was no bond.

The Court: Of course, I should think the bond is only to secure payment of damages and that you would have a claim in the absence of bond for damages, and whether this might not be, of course, I am not going to try to decide that, but it would seem to me there would be a possibility of recovering these taxes as damages growing out of the injunction, the erroneous injunction. It would be better to get them directly here.

Mr. Klasen: I don't think it would be necessary to require the County to seek other remedy when the money is [288] here and these facts are before the Court, especially, in view of the fact where they are taking advantage of the injunction and arguing the injunction to the Court.

That generally sets out the County's argument that in the interpretation of this insofar as these

'56—

The Court: (interposing) Yes, I get your point on that, that since they are not paid or encumbering, that would still give the right to the County to collect those taxes prior to June 15, 1956.

Mr. Iversen: If the Court please, the language of 511 is, of course, as counsel has read it. The only exception is, to 511:



"Taxes and assessments not paid or encumbering such property prior to June 15, 1956."

Of course, clearly, these were not paid, the question is whether they were encumbered. "Encumbering" has been defined in a number of cases, of course, the Supreme Court of the State of Washington has defined it in a number of cases. It is the definition that is general throughout the country, that is, an encumbrance must actually be an interest in the land, in the case of *Head vs. Severson*—32 Wn. (2d), 159, on Page 167, they say:

"Encumbrance has been defined by this court to be any right to, or interest in land which may exist in any third party from diminution of the value of the estate of the tenant. A burden [289] on land appreciative of its value, such as a lien, easement or servitude, does not conflict with the interest in fee."

Now, you will note that they say: "interest, lien or servitude".

Now, that was repeated in another case in the same volume, and it is substantially the same definition that appears in American Jurisprudence on "Encumbrance", so, I think that encumbrance has to be actually something that had accrued and had been affixed to the land at that time. Now, that is different from a mere cloud on a title. In this case *Puget Sound Power & Light Company versus Cowlitz County*, now, that is the one that we have cited before, the one that the Court holds that the law with respect to personal property in Washington is the same as with respect to real property

and where the Supreme Court of Washington held that since there can be no valid tax until there has been a levy specifying the amount thereof, there is no tax until specifying the levy, and then the Court went on to say, I am quoting from the wrong case. They affirmed in that case and applied to personal property taxes the decision of the Supreme Court of the State of Washington—71 Wash., 321, State of Washington versus Snohomish County. In that case they were talking there about certificates that had been issued for taxes:

“When the certificate constitutes [290] a mere cloud and not a lien as further evidenced from the fact that not either the holder of the certificate or the County \* \* \*. A lien without enforceability in rem would be an anomaly.”

They said in that case:

“We are constrained to hold that the statute creating a lien as to property taxes makes the lien only incipient or inchoate on March 1st and becomes a complete or enforceable lien as from that date back only upon the making of a valid levy.”

So that without beating this proposition to death, it is our contention that the taxes did not become a lien and, therefore, did not fall within the terms of the Federal statute, or the exception to the Federal statute. They have not become an encumbrance on the property prior to that date in June, June 15, 1956. Having become an encumbrance on the property only when they were finally picked up in 1957, under that statute for picking up omitted

property, those that are picked up are placed on the rolls for the year in which they are picked up and can be paid without interest or penalty during that year, so they are actually taxes levied during the year in which they were picked up, which was 1957. They first became encumbered subsequent to that date, so that we think the same rules apply to 1955 taxes as to all others and, of course, insofar as 1956 taxes are concerned they didn't [291] become levied until October of 1956, you see, they were assessed in 1955. Well, I am talking about receipts, see, the 1956 taxes were the ones assessed in 1955, they are the ones that I was talking about, and as far as the taxes for the next year were concerned, they didn't become a lien until in October of 1956 when the levy occurred.

The Court: In '56? I think we discussed that when we had the hearing before, the '56 taxes, I came to the conclusion would not become a lien until October, 1956, when the County Commissioners made the assessment.

Mr. Iversen: So that we only have the one year's taxes and it is simply our conclusion that they didn't become a lien since that date.

The Court: Well, I have had an opportunity to consider this and think it over since the argument here, and I am inclined to think that I should not give a strict and narrow construction to the language of this statute. I think it was the intent of Congress that this Act was to meet the situation that developed by reason of the Supreme Court decision. Their definite policy was, I think, as to

future taxes, as to ones that hadn't become an encumbrance, as they say, that is, for future taxes this new Act would apply which allowed an offset to be determined by the Secretary against the local taxes, and I don't think it was the intention of Congress to have it to apply to taxes for prior years as far [292] back as the 1955 tax, and the only reason that that wasn't regularly assessed and levied was because of an injunction which was procured by these taxpayers and, ultimately, the injunction proved to be unwarranted and, of course, the decision of the Supreme Court of the State is final on that, that they determined that there was a wrong injunction and that the County had been wrongfully precluded from making the regular assessments at the regular time in the regular way. I don't know, it seems to me that the Court might, although, apparently, it didn't, give the County the right to assess these taxes *nunc pro tunc* as of the date when they would have assessed but, of course, that wasn't done, but I think that these 1955 taxes which were held up, the process was interfered with by an abortive injunction, that it was the intent of Congress that they should not come within this Act and that they should be allowed, although I think if there is any interest it should be interest that would apply under the omitted property statute. I think that might be a little inconsistent, but I am inclined to think that since the taxpayers have no opportunity to pay the interest that it should be allowed from the date of levy, and I don't know, is there any interest in-

volved here, Mr. Iversen, on that basis, or can you tell me?

Mr. Iversen: Let's see, that would be payable in 1957. Yes, I guess there would be interest. I was just [293] trying to figure out when it was.

The Court: They have assessed as of '56, weren't they?

Mr. Iversen: They were assessed as of '57, yes, so that would be payable in 1957. Let me see just what that statute says. I have the statute here, just a moment:

"When such omitted assessments are made the test is whether they are omitted on the due date when the assessment is made."

Let's see, one year from the due date in 1957 would be February 15, 1957, so there is interest that would date, I guess, from February 15, 1958.

The Court: February, 1958?

Mr. Iversen: I think February 15.

The Court: Well, that is your conception of it, Mr. Klasen?

Mr. Iversen: The 1955 taxes which became assessed the Court is going to consider those as having been as though they were assessed under the omitted property section, and that was done in 1957, so they were due then as of the date the 1957 taxes would have been due, that would be February 15, 1957.

The Court: Of course, I think you run into difficulties if you try to literally put them back, either the year when they should have been assessed, because the levy [294] is different, actually,

isn't it? Isn't the rate of levy that the taxes would apply here, would be 1957, not the prior year? The year for which they were put in, not the prior year?

Mr. Iversen: That is right, and then they would be payable without interest for one year from date of the taxes for which the assessment was made. Now, the taxes in the year 1957 would have been payable February, 1957. There is, actually, some retroactive effect there, and so within one year after that, it would be February, 1958. Here is the statute eight, four, five, six, zero, one, zero, that is the one that reads "on the First of January."

The Court: I beg your pardon, Mr. Iversen, I didn't get that?

Mr. Iversen: I think the applicable statute is eighty-four, fifty-six, zero, one, zero, which reads:

"On the first Monday in January next succeeding the date of the levy of taxes the County Auditor shall deliver to the County Treasurer the taxes for such assessment year, his warrant thereto attached, authorizing the collection of taxes taken in receipt therefor and such roll shall be taken as a public record, etc."

I will skip that part of that:

"And this will be sufficient authority for the County Treasurer to collect all taxes thereon [295] levied, but the County Treasurer shall in no case issue receipt therefor or collect such taxes upon said assessment rolls before the 15th day of February that follows."

Now, with respect to the pick-up taxes, I am



not quite certain there whether if you pick up past taxes in 1957 in the year in which they were picked up, now, they were picked up in 1957; now, I presume that that means taxes payable in 1957, although normally the taxes levied in 1957 would be payable in February, 1958, but I suppose that that is probably fair.

The Court: Yes, I got the impression some way that they were picked up as of 1956 and the rate of levy was 1956 and these omitted taxes were 1957, is that correct?

Mr. Iversen: No, I think that is wrong.

The Court: That is wrong?

Mr. Iversen: That they were listed in 1957. As far as the Moses Lake Homes, the remittitur came down in December, 1957.

The Court: Well, at any rate, these findings, conclusions and judgment that have been submitted by the defendants here will have to be changed to the extent of incorporating this ruling that the Court has made today so that you will have an opportunity and time to check that up, Mr. Klasen, and see about the matter of interest.

Mr. Klasen: One matter I would like to make clear to the Court. [296]

The Court: All right.

Mr. Klasen: I recall last Thursday, was about this matter of '55 and '56 taxes. Now, the original assessments for which the injunction was obtained, the property was listed 1954. In other words, there has been a little bit of misunderstanding, I think, in 1954 was when the injunction was issued. Now,

I think I am right on that and those taxes would have become a lien in the following October, '54. Then, in '55. there would have been another assessment for '55.

The Court: When in '55?

Mr. Klasen: 1955, and that lien would have come in October, 1955.

Mr. Iversen: That never was listed. However, that was listed for the first time in October, '57.

The Court: Yes.

Mr. Klasen: We realize that, of course, the injunctions, as the Court can see, any attempt at all and Mr. Powers would have been in jail.

The Court: I haven't it clearly in mind, it is always confusing to me, this year of taxes, because sometimes they are mentioned as the year of assessment and sometimes the year of payment, and it is hard to distinguish. I think I have made it clear what my thought is and what my decision is on it and the basis of it so that if you have taxes there [297] two years that didn't become a lien, or that didn't become a lien, rather, where the levy was made and they became a lien on the property prior to June 15, 1956, then both years should be allowed, whatever they are.

Mr. Iversen: I wanted to ask your Honor about that, we have a different situation on the two. In order for them to become a lien, of course, you have two things that must occur, one of them they must be listed, that is the first thing, in effect, the statute, itself, says that they must be listed to be first and then they must be levied. Now, insofar

as the taxes which were assessed in 1954 they were listed, they were listed in 1954, and the only thing that didn't happen as to them was that the levy didn't occur because of the injunction. Now, insofar as the taxes for the next year, however, were concerned, they were not listed and the exhibits here will show clearly that they were picked up as omitted property, even on the initial detailed assessment list it is endorsed right on there and they were assessed in 1957 for 1956, so that there can't be any question that they clearly fell within the omitted property section. So, it seems to me you have quite a different situation with respect to those listed in 1954, probably, it was only the mathematical calculation on applying the levy that still remained to be done. That is, they were not on the assessment list put in as omitted property, and, as your Honor said, there might be [298] some inconsistency in what your Honor was doing now that wouldn't apply with respect to those taxes for the next year because it shows right on the detailed assessment list that they are picked up as omitted property in 1957, so the whole process was initiated in 1957. So, I think we have quite a different situation as to those, we ought clearly to be within your Honor's ruling.

The Court: I am not literally applying these tax statutes and I try to make it clear that I am endeavoring here to look at the substance rather than the form, at the real situation rather than what the artificial one was that has been created by reason of the wrongful injunction, and the thing that

I am basing my decision on that these were taxes but for an abortive injunction that would have applied and the statute would have become a lien prior to the effective date of this amendment to the Federal statute which sets up this offset against the taxes, so that I think looking at it in that broad way, it's my decision that they should not be within the provisions as to offsets.

Mr. Felix: May I speak, your Honor?

The Court: Yes.

Mr. Felix: I think your Honor's decision in that regard is well stated. It is well put, you are stating that you are liberally construing the statute, those that do not apply, do not apply as long as they became a lien prior to [299] June, '56. My name is Jennings Felix, I used to appear before you quite often defending Mr. Smith, formerly of the Washington State Penitentiary on habeas corpus matters some years ago. This is somewhat like one of those cases, they have been up and down to the United States Supreme Court and now we are back before the Federal District Court.

There are several things that bother me that I think should be brought to the Court's attention relative to what the record will be on appeal as I examined the declaration by the Secretary of the Air Force which your Honor declines to go behind. It appears that that is a total computation of the three separate entities and there is nothing within the declaration itself or within the evidence that has thus far been submitted to determine just what would be offsets against Larsonaire or what would

be offsets against Larson Heights or what would be offsets against Moses Lake Homes, and I am wondering whether or not the record is in sufficient clarity for a decision to be made distributing the money without that basic breakdown which, probably, could be provided by the normal pre-trial conference. That is one thing that bothers me, and the second thing that bothers me is that I am wondering whether or not, without an offer of proof on behalf of Grant County relative to the fact that your Honor declines to hear it, and that is your Honor's decision, but I think we still may be required by the Circuit Court of [300] Appeals to have made an offer of proof to the effect that the services that were allegedly offset by the Secretary were not those customarily provided by Grant County. Now, I don't desire to reopen what your Honor has already ruled on, but that portion relative to the appeal bothers me, too, and I think also that could be resolved by a pre-trial conference and then have, as I see it, a more clear record. Perhaps, I am somewhat hesitant, I know I have heard Judge Matthews ride counsel pretty heavily for failure to have a correct record.

The Court: Well, I think the difficulty is here on the understanding, I think the reporter's notes will show that it was on the agreed facts, the facts necessary to decide these questions of law were not in dispute, that there were not any factual issues to be resolved. Now, if I permit the loser to back up and say, "The facts were all right, if you decided in my favor, now, we want to proceed

to trial", if Mr. Iversen agrees about that, it is perfectly all right.

Mr. Felix: I understood Mr. Klasen to say that he had asked for a pre-trial conference and he had been informed by the Clerk of the Court that there would be no taking of testimony or witnesses at that time.

The Court: I announced at the very outset of the hearing here I am not going to sit and listen to a whole day of argument if it is fruitless and doesn't result in a final decision of this controversy, if there is any dispute on the [301] facts, you will either have to agree on the facts or we will have them set up in the way of pre-trial, a pre-trial conference, and then we can decide the law. Now, I proceeded on the basis that there wasn't any facts in dispute or controversy. Now, I had assumed that I had before me the proposition that many of these services were not services furnished by Grant County. Now, whether that is here in the form of an affidavit or stipulation or what it is, but I assumed that that was before me, isn't that the case, Mr. Iversen?

Mr. Iversen: I think so, yes, your Honor.

The Court: Either in stipulation form or some other that the County doesn't pave streets or put in water systems or sewage disposal systems, and such as that, so that I don't think you need to be concerned on that feature of it.

Mr. Felix: That is part of the findings, then?

The Court: That is before the Court.

Mr. Felix: I didn't wish to reopen old wounds.



or rehash previously digested material. As I say, I came in, perhaps, I shouldn't have spoken that way because I wasn't aware of the fact that your Honor had made that assumption.

The Court: Pardon me, it was argued here and I had assumed, I didn't check the affidavits and stipulations because counsel told me that there wasn't any dispute as to the facts.

Mr. Felix: I think, then, the findings that we have [302] proposed with respect to matters proposed will tend to take care of that. Then, we will make that as complete as possible.

All right, your Honor, thank you.

The Court: Well, of course, I have always thought that the orderly way for a Court to proceed where you have, regardless of what evidence you may have before you, is to make the findings that are necessary to sustain the conclusions as to law and the judgment that the Court is to enter. I don't think a party who is not satisfied or questions the Court's decision has to get findings of a factual basis for his theory, something that would warrant that.

Mr. Felix: Oh, no, that is correct.

The Court: That would warrant my deciding it the other way. If the evidence is there, it should have been regarded and would be decisive.

Mr. Felix: Particularly, where there is no oral testimony.

The Court: Yes, that is true, if there is a conflict, of course, then, you would want to know what the Court's conclusions were concerning it.

Mr. Klasen: I do recall the Court's opening statement regarding those facts. The only thing that gave me some concern, I discussed it with Mr. Felix, was whether the Court considered those factors about the services rendered [303] by the County in making the decision. As I recall the Court's decision was to the effect that it didn't have the authority to go into the determination by the Air Force, but Grant County never stipulated one way or the other insofar as those services were rendered. I assumed that the Court's decision on that matter was on the basis of the fact that the Court did not have the jurisdiction to question the determination by the Air Force and that was that, and I discussed it with Mr. Felix and we thought, perhaps, if that was not the case that we would just, for the purpose of the record, have some other stipulated facts or something, but as long as it is stipulated in the record that Mr. Iversen has agreed to those things, at least, that was the basis we argued to the Court. I know that those services were not rendered by the County.

The Court: What is your recollection on that, Mr. Iversen?

Mr. Iversen: Well, we had a series of requests for admissions and they had requested that and we had come back with an answer that these were services similar to services rendered by municipal corporations, which might be a part of Grant County, and so forth, and when we had the colloquy prior to starting the case your Honor asked if there were any facts still to be considered and

whether these matters would be matters that would be considered by you and were material and we had considerable discussion over that proposition and, [304] certainly, the matter was tendered and the matter was argued and your Honor, in fact, discussed it in the opinion that Congress had the right to consider these matters, so I think it was all before the Court.

The Court: Well, I thought so, it was argued, certainly, here and since Mr. Iversen has mentioned it, it runs in my mind that quite a lot of the factual foundation here consists of requests for admissions or interrogatories.

Mr. Felix: Yes, there was some disagreement between the parties as to what they would or would not admit, but I didn't feel it my duty to call to your attention those qualms that I mentioned to the Court.

Mr. Iversen: If your Honor please, with regard to settling the findings I am just wondering, apparently, your Honor has decided against me on part of this. Rather than come back, supposing we might interline something here that will do the job? I have some suggestions on that.

The Court: I assume that this case will go to the Court of Appeals on this short record and so that both these decisions of mine will be before the Court of Appeals. I hope they won't send it back for additional findings. If they feel that the factual foundation isn't adequate, they will send it back for additional findings. I hope we won't have that additional delay and trouble. I wonder if it

might not be preferable here to see if you can't work the findings [305] out, now?

Mr. Iversen: I have a suggestion here as to how we might do it. On my proposed findings at the end of paragraph three I would propose to, let's see, I want to be sure and get the right paragraph here now, interlining following paragraph three.

The Court: Are you referring to the findings, now?

Mr. Felix: Now, that you mention it, we prefer the opportunity to prepare detailed findings of fact and submit them to your Honor in accordance with what we consider to be your Honor's ruling.

Mr. Iversen: I hate to be coming back over here.

Mr. Felix: I have to come just as far as Mr. Iversen does. It is a matter that can be submitted by mail.

Mr. Iversen: I think we can take care of this by just interlining a little bit. What I would like to suggest here is that we write in at the end of this that these taxes for 1955 and for 1956 would become liens upon the property prior to June 15, 1956, had an injunction of the State Court not prevented it, and that the Court will consider them as having been an encumbrance as of that time. I think that would fix the situation. That would be just in accordance with your Honor's decision.

The Court: Have you any objection to the findings other than the change? [306]

Mr. Felix: Yes, very much. The findings, your Honor probably hasn't had the opportunity to ex-

amine them. We only have had two days, but we find that the findings include a great number of conclusions of law with which we disagree. We don't think it is the findings of the Court. Naturally, I don't blame Mr. Iversen for trying to put them in. For instance, at the bottom of Page 4, the finding:

"The State of Washington has declared by its Supreme Court taxes on Wherry Housing Projects exceed taxes and assessments on other property of similar value."

That is a specific finding that these taxes are unconstitutional because under the general law of the State all taxes must be universal. Then, we are right back, I don't think your Honor intended to hold that.

Mr. Iversen: It is part of what your Honor found.

The Court: What I intended to find was that they were assessed on a different basis than other leaseholds in that they were assessed on the basis of the actual value of the improvements rather than the actual leasehold.

Mr. Iversen: That is what I am trying to say here, that is what I thought that I said. I didn't intend to make any specific finding that the rates were higher on this than some other leasehold that John Doe held some other place. I think that I didn't have an opportunity to go over these in detail, although I have read through them hurriedly. What [307] time do you gentlemen plan on going

back? Let's see, Mr. Felix is from Seattle and you are from Ephrata?

Mr. Felix: I am with Mr. Klasen.

The Court: Are you driving?

Mr. Klasen: Yes, your Honor.

Mr. Felix: I appreciate the desire for haste and I am certainly not here to procrastinate. I think this is a matter of sufficient importance that not lengthy but a thorough study should be given.

The Court: Well, I think that what we should do if you wish additional time to make suggestions here, that we try to work out findings and conclusions that the Court feels is in accord with his decision here, Mr. Iversen, and then proceed under the general civil rules, and I propose to sign them and then under the rule opposing counsel would have ten days in which to suggest amendments, and they can do that by serving them on you by mail or on me by mail. I will probably be in Pasco or Walla Walla, unless there is something that makes me change my mind on the merits I, frankly, would not expect to have another hearing on them. I would simply pass on them and if I were doubtful about them I would give you an opportunity to be heard, either by written memorandum or oral argument.

Mr. Iversen: I will see how it is going to work. Counsel will make up and serve on us their objections or [308] their suggestions.

The Court: Under the rule as to proposed amendments.

Mr. Iversen: Normally, that would come on for



a hearing if we are unable to agree. Of course, we might be able to agree.

The Court: No, I don't think that a hearing is required. It is usually the practice, of course, where counsel are all in one place and the Court is there, but I am not going to have you gentlemen come over here again if it can be avoided.

Mr. Felix: That would be perfectly proper.

The Court: What I propose to do here is to give them an opportunity, as the rule provides, within ten days to propose amendments and then if I do not accept them I will so indicate and let you know. If I feel I should consider them further, I will give you an opportunity to submit a written memo and then if it gets too serious I will give you an opportunity for another hearing at Yakima, or some place.

Mr. Felix: All right, your Honor.

The Court: Suppose I recess until eleven-thirty or until one-thirty this afternoon. Supposing I recess until one-thirty and give you an opportunity to get something that is specific here and do you have facilities for doing that?

Mr. Iversen: I can probably find a stenographer.

The Court: You can use the reporter, of course, he [309] is a little high-priced for stenographic services, possibly.

Mr. Iversen: We will see whether we can get anywhere on that, it depends on whether Mr. Felix and I can sit down and study it over.

Mr. Felix: Frankly, we have had an opportunity to study it and we would prefer to go by the gen-

eral rules. Mr. Iversen could submit his amendments and then we would have the ten days following that. We would mail them to your Honor, or either to us or to him.

The Court: On this matter of determination, as I understand it, that determination has been made and is down there, such as it is, in blanket form, isn't it, that isn't broken down as to separate ownerships or separate years?

Mr. Iversen: It might be for the purpose of the record, if it is going to be appealed. Subsequent to the last hearing we had received what we had asked for, that is the certified copy of the decision. I have that, now, and maybe counsel would just as soon put that in the record, because it is a better copy than the one attached to the requests for admissions.

Mr. Felix: It is prettier, but is it detailed?

The Court: It is the same thing.

Mr. Iversen: Yes, it is the same thing. It is in as attached to the admissions and I have this pretty document which is just in my file. [310]

Mr. Klasen: We have admitted that that is the determination that was made.

The Court: It will be received, then, as the next numbered exhibit.

Clerk of the Court: Exhibit "D", your Honor.

(Whereupon, said document was admitted in evidence as Defendants' Exhibit No. "D".)

The Court: But the thought I had on segregation, or breaking down this determination, if we started to get the Secretary to do that, that would

be a different determination, we would have another lawsuit, mightn't we?

Mr. Iverson: We might start all over again. Your Honor said that since these taxes were all assessed in '57 that it wasn't necessary to break them down and that we would apply them to the whole time, anyway, so I don't think it is material, actually.

The Court: Well, that is the view I took of it, that since the Secretary had no occasion or nothing on which he could base a determination prior to the year in which they were all lumped in here, that it was perfectly logical and, I thought, proper for him to make one determination so far as the years are concerned.

Mr. Felix: May I ask Mr. Iversen a question: do you know whether or not this determination includes the moneys that were spent prior to June 13, 1956, or, for example, [311] from 1950 on?

Mr. Iversen: Well, the thing just speaks for itself; I really don't know. All I know is what the Secretary sent us.

The Court: It does specify what items are covered, doesn't it, for instance, street improvements at the Base there, and roads?

Mr. Iversen: Yes, sir.

The Court: And I think some sewer system.

Mr. Felix: Police protection, sidewalks and curbing and that sort of thing. It doesn't segregate them as distinct for years, nor does it distinguish as to entities. Now, the question I just asked, and Mr. Iversen says he doesn't know, does the Secretary

include the moneys that were spent from 1950 on up to June, 1956, as being an offset as against the taxes we are now speaking of?

Mr. Iversen: It does presume that the Secretary did what he was supposed to do. We don't know what he did.

The Court: So far as your concern, Mr. Felix, about the items covered there for services or expenditures or improvements that ordinarily wouldn't be made by Grant County, I think the Court could almost take judicial notice of the fact that a County does not pave streets or put in water systems or sewer systems.

Mr. Felix: In fact, we would have statutory [312] authority for your Honor on that. The part that was bothering me, though, was not my interpretation of this law, the offset for expenditures made prior to June of '56. Those expenditures are gone just like the taxes are supposed to have been paid and gone, and from June, '56, on then it permits the offsets to come about and I think the expenditures from June, '56, on would be the proper offsets and there is no breakdown by which we can reach that issue in the declaration, and that is why I asked.

The Court: Well, I just don't think it is possible to make it at this stage of the litigation. No matter what we did, I don't think we could go back and get another determination, anyway. Well, I will recess until one-thirty.

Mr. Iversen: I just wonder if anything is going to be accomplished. Mr. Felix feels that he has

to do some more studying, I am wondering if we could get together.

The Court: That would be the only thing that would be possible. It doesn't look to me as if it is possible. You know what I have held, Mr. Iversen, as to my views on these matters. If you can submit matters amending them, you can submit findings and judgment that conform to my views, and I will sign them regardless of whether Mr. Felix and Mr. Klasen agree with them or not, and then they will have their ten days to propose amendments.

By the way, in the other case Mr. Cheadle submitted [313] a memorandum or brief on this question of whether I could enter a final judgment here under Rule 54 B, and I not only read the cases that he cited but looked up some of my own. I had in mind, particularly, one case I was concerned about in which my friend, Judge McLaughlin, from Hawaii, wrote the opinion for the Court of Appeals. I think it is somebody against Twentieth Century Fox. He held that it doesn't apply to separate parties but only to separate issues. I think here there are separate claims. I think the claim of the County for the taxes here is, certainly, separate and apart and is entirely different from your claim for just compensation for the taking of public properties for private use. The Court of Appeals has been, may I suggest, the Court of Appeals has been very exacting about this rule. If you will put in there that there has been no just cause for delay. Oh, I didn't see it, I think what-

ever else you say, you may put that in, I wish you would put that in. I might say, do you wish your originals back?

Mr. Iversen: Well, I might be able to use some of the pages.

The Court: Do you have a copy that I could look over in the meantime? I assume that this will be practically the same, except for such changes. I might suggest this, while I doubt that you can actually get together on the form, the wordings of these findings, Mr. Felix, if you would point [314] out to Mr. Iversen the particulars in which you seriously object; it might be that he could make some adjustment of those that would make it unnecessary to have another hearing.

Mr. Felix: We are perfectly willing.

The Court: All right, recess until one-thirty.

(Whereupon, court was adjourned until one-thirty o'clock p.m. on July 3rd, 1958.) [315]

Spokane, Washington, Thursday, July 3rd, 1958,  
1:30 o'clock p.m.

(Whereupon, the trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to-wit:)

Mr. Iversen: I have handed up the findings, I think your Honor got them.

The Court: Yes, I just finished reading the modified or redrafted proposals that you had here. Do you have any comment to make at this time, Mr. Felix, about the proposals?



Mr. Felix: There is one thing that, apparently, was overlooked. I didn't realize it, Mr. Klasen brought it to my attention, and that is relative to the 1956 taxes, that is, the taxes that were assessed as of January 1, 1955, relative to Larsonaire Homes. Now, Larsonaire Homes, as I recall, was built or constructed during the pendency of this litigation relative to Moses Lake Homes, and Mr. Powers, the Assessor, did not assess the 1956 taxes against the Larsonaire Homes people because of the pendency of the other action, preferring to wait and, as a matter of fact, it isn't too far wrong, the United States Supreme Court decision was five to four, but we feel that the 1956 taxes on Larsonaire Homes should also be allowed to the County. Now, these were assessed as omitted taxes, that is correct. They were not collected, the [316] reason they were not collected is because of the injunction issued out of this court prohibiting the collection of those taxes, and we feel the injunction was proper because it was as set out in U.S.C.A., Section 1341:

"The District Court shall not enjoin any tax under State law where a plain and speedy remedy may be enacted."

Now, I hope that your Honor has considered that specific point before, maybe it is the error of all counsel in not directing your attention to it earlier, but these would have been taxes.

The Court: Were they assessed in the year 1956?

Mr. Felix: They were not actually assessed, they would have been assessed for the pendency of the action in the Moses Lake case.

Mr. Iversen: They were not enjoined. There was no injunction with respect to Larsonaire. The only injunction that was out had to do with Moses Lake.

The Court: I was just thinking, Mr. Iversen, even if there had been an injunction, I find myself getting off here, it is rather hard for me to follow all of these dates, but, as I recall the position that I have taken is that the lien of the tax does not apply until the County Commissioners have acted in the Fall, or October of the year in which the assessment is made, so even if there hadn't been any holding this up on account of the litigation, even if that hadn't [317] happened, the assessment had been made in the regular course and in the regular way, it would have been made, as I understand it, in the Spring of 1956 and the levy would not have been made until October of that year, which would have been after the date of the effectiveness of this Housing Act amendment, June 15, 1956.

Mr. Felix: That would have been after the 1957 taxes, though, I am speaking now of the 1956 taxes which were levied and assessed as of March, 1955, and then would become a lien had the procedure been followed in the Fall, or October, of 1955, and then become payable in the Spring of 1956 prior to the time of the effective date. I am speaking of those years' taxes.

The Court: I am confused again, are these taxes in which the Assessor went out and assessed or would have assessed this property in 1955?

Mr. Felix: Well, yes, he would have.

The Court: 1955?

Mr. Felix: He would have except that there was an injunction by Moses Lake Homes, Incorporated, and it was at the time well-known if he had assessed them against Larsonaire and Larson Heights he would also be in court on a similar injunction, but those are taxes which were properly due prior to the date of the June, '56, amendment.

The Court: Well, I am inclined to think I might [318] shorten this, Mr. Iversen, by not calling on you, first, but it would seem to me that if the Assessor wasn't enjoined that he was just simply trying to guess what would happen to the lawsuit. I think it is in a different situation than if he had actually been enjoined. It so happens that this is property on the same project, supposing that you had another big Base there comparable to Fairchild here and housing, "Well, there is no use making any assessments here, somebody has enjoined me, I am not going to make any assessments here of any of the property," I think that is something that he has taken on himself. He isn't under the protection of an injunction. I don't think that my ruling on the other would apply. Was that your thought?

Mr. Felix: I would assume that that must be the language that Mr. Iversen was using in arguing against me. In Finding of Fact Number 2, as I read the transcript of the Court's opinion, this Court has held that the Assessor assessed the leasehold interest and that was valued according to the

State Supreme Court in an unusual or different or varying manner than it usually is done under the Metropolitan lease cases, and this language here is:

"Grant County has listed for tax purposes the improvements placed upon the leased property, other than the leasehold interest."

I don't think that follows. It is about Line 15 on Page 2, [319] Findings of Fact.

The Court: On Finding of Fact Number 2?

Mr. Iversen: This is exactly what happened, this is exactly what the fact is.

The Court: Well, as I remember it in the argument here, and I didn't check to see just exactly what the Assessor had done, but as I remember your records here show not an assessment of the leasehold interest at the value of the improvements but an actual assessment of the improvements. That is what your detail shows here.

Mr. Felix: And as I read the transcript of your oral decision, that that may have been true and the State Supreme Court has held in a binding manner on both parties here that this was an assessment of the leasehold interest.

The Court: Well, my conclusion is fairly stated in here. I don't think I have any right to say that the Assessor assessed the leasehold when he says he didn't. I am saying that what he was undertaking to do and what I assume he was doing was valuing the leasehold at the value of the improvements, and I don't think that that is proper because that the Supreme Court upheld that only because

they thought the Supreme Court of the United States had directed that that is what should be done under this Federal statute in this type of leasehold, and I don't so construe the Federal statute, and I have as much right to construe the Federal statute [320] as the Supreme Court of the State of Washington. I haven't any right to construe contrary to their construction the statutes of the State. But that is the conclusion that I came to, I don't think the Supreme Court said in this Moses Lake case every leasehold. Now, we are repudiating and overruling these Metropolitan cases, as a matter of fact, they didn't mention the Metropolitan Building Company case, as I recall.

Mr. Felix: I presented an oral argument on it. I think Mr. Zinn presented oral arguments, the Metropolitan lease cases were very strongly urged by Moses Lake Homes and the distinction made or, at least, attempted by myself on behalf of Grant County was this, in the Grant County matter we had a lease for a period of seventy-five years and the improvements were not going to last the length of that term, so quite obviously the beneficial value of those improvements were solely the property of the lessee and thus should be taxed to him despite the fact that there was naked title in the United States. In the Metropolitan lease cases, however, you have very permanent type buildings made of stone and mortar and brick, and so forth, that would last for very many years. At those times, at the termination of that lease term, there will still be something in the way of improvements to revert

back to the lessor and that is why the Metropolitan lease cases, we submit, aren't even in point. [321]

The Court: I beg your pardon, isn't there a case in Washington here where they held that the improvements on a 999 year lease were part of the real property and not separate property?

Mr. Felix: No, they said the 999 year lease was still a lease, even though as a practical matter, the amount of fee—

The Court: (Interposing) I don't think the length of the lease governs. This was presented in the argument here, and I don't take the view of it that there is a valid distinction, particularly, where there is an obligation to repair and replace, so that at the end of the fifty year or seventy-five year lease there would be substantially the same sort of improvements on it as there was at the beginning, but, at any rate, that particular version is ruled upon.

Mr. Felix: I think your Honor has already indicated that you disagree with me. Well, first of all, let me point out this at the top of Page 4, I don't know that this was your interpretation or not, the second line at the top of Page 4:

"None of those taxes became a lien on those properties at a time subsequent to June, 1956" is that your holding?

The Court: Well, I think that is true if it is strictly speaking, under the statutes. I don't think that [322] the lien would attach until the levy was made, and that would apply to all these taxes with the possible exception of one year. Well, the levy wasn't made in that, was it?



Mr. Felix: No, as soon as the detailed assessment sheets were made out and forwarded to the Moses Lake Homes, the taxpayers then immediately sought an injunction and it was obtained.

The Court: I base it on the broad, that is, my separate ruling on the others. I don't think you can say a lien attached prior to that date, but I think for the reasons that I have given this morning, I think that the others are in a different situation.

Mr. Felix: Now, I think I called this to the attention of the Court earlier and, as I say, you may have disagreed with me, but I still think it should be clarified, at the bottom of the same page:

"By the laws of the State of Washington taxes in re assessments of housing projects are levied at a rate higher than on other properties of similar value."

I would like to call to the attention of the Court that this would be a finding that the taxes levied against the Wherry Housing Project are unconstitutional under the laws of the State of Washington, which require that all taxes be uniformly levied upon the same type of property, which would be completely inconsistent with the Moses Lake Homes v. Grant [323] County case.

The Court: I am not construing or passing upon any constitutional provisions of the State of Washington. I am simply saying that for the purpose of this Federal statute, which I had before me and am construing, there is a difference in tax, in the method of taxation, in the two classes and, obviously, of course, there is, whether the special treat-

ment that has been given to Federal housing is all right under the State law and Federal law, is open to question, perhaps. I don't think it is open to question that they are treated differently.

Mr. Felix: I would suggest, then——

The Court: (Interposing) This one in the third I am not directly concerned about, my so-called finding as to when the lien of the taxes attached, I think that is a conclusion of law rather than a finding of fact, and if the Court disagrees with me, a finding isn't going to save me because it isn't a factual finding.

Mr. Felix: I had it marked here. I would suggest that for the purpose of the Federal statute here involved——

The Court: (Interposing) I will look at that again.

Mr. Iversen: It doesn't purport to be any construction of the State Constitution. It has been sustained by the State Supreme Court. I don't think it is any question of reversing the Supreme Court.

The Court: Well, I think that any implication, I am inferentially holding that these assessments are unconstitutional. I have this suggestion, Mr. Iversen, the sentence that begins on Page 26, I think, that you have, to me, at any rate, clearly set out the basis for my statement that appears in that sentence, or what will be my statement if I sign the findings that there is a different basis. I make this suggestion "That by the laws of the State of Washington" on Line 26:

"That by the laws of the State of Washington

is declared by the Supreme Court taxes and assessments on Wherry Housing Projects are"

and then insert there:

"thus levied upon a basis different and higher than the amount of taxes"

which makes it different than what has been said before, and doesn't leave a bald statement.

"Are thus levied upon a basis different than the amount of taxes and assessments on other property of similar value."

Mr. Felix: It is my understanding that there would be some language in here to the effect that Grant County does not customarily provide the services that are recited in Paragraph 5, and I might suggest in Line 17, that short sentence should and could be inserted, Line 17, Page 5.

Mr. Iversen: Unless it is also indicated that [325] municipalities might furnish such services, I don't think it would belong in there. I don't think it is material. And here you have actual municipal facilities furnished by the Government and the sponsor which, of course, the County does not furnish in rural areas.

Mr. Felix: The County does not furnish them in city areas, either, Mr. Iversen. Under no circumstances does the County provide sewer and water systems, fire lines and hydrants and street lighting, and so forth.

Mr. Iversen: They would be collecting taxes from somebody if you had a municipal corporation in there, and this is actually a municipal situation you have here. It is like a settled area, and Congress

doesn't say anywhere, it says that you have to show that that particular taxing agency would have furnished it. It merely says that these things are such things as are customarily furnished. Of course, that can be passed as to anywhere. Congress passed that Act with respect to the whole country.

The Court: These taxes while, of course, Grant County is the claimant here and the party to the litigation the taxes are not confined to strictly County taxes, are they, they would be school districts?

Mr. Felix: The County Treasurer as the ex officio Treasurer of the County, directs no water assessments and sewer assessments and assessments to the L. I. D.'s are [326] payable to the County Treasurer. While the assessments are specified for and could only be used for retiring of the revenue bonds, for example, which support the installation of the assessment, and the assessments can be no higher than the total assessment against the piece of property, against the piece of property, can be no higher than the amount of the benefit given to that property by virtue of the installation of the improvements.

Mr. Iversen: It might or might not operate by assessment. At some cities they do provide street lighting and all those things without any assessments. Those things are as varied as the policies of the different cities.

The Court: Aren't there requests for admissions here on this point?

Mr. Felix: Yes, and I think they were denied.

Mr. Iversen: They had a request for admissions to the effect that Grant County did not furnish these things and we have said to the effect that while Grant County did not furnish them that the municipality, that these are services that might be furnished by municipalities for which Grant County would be the collection agency. Now, here is what you have, Congress has passed this Act and has merely said

"Such things as are customarily furnished." I don't think they had particularly in mind what Grant County [327] was doing, but these are the kind of things that Congress has picked out that will be credited, and they have specifically said such as snow removal, and all these other things, but they didn't make it conditional that that particular municipality would have furnished that service because this is a service, you have created a new condition, you have established practically an urban area on a municipal base. Now, the Government is furnishing those actual urban facilities to that area and Congress had the right to say that such things as are customarily furnished are entitled to be credited.

Mr. Felix: Of course, when you are attacking Grant County taxes and Grant County's taxes are going to pay for such things as the Prosecutor's salary, the Judges, the current operating expense of the County, and so forth, you are offsetting these other services which are not supplied against the services which are, and you don't have the quid pro quo, which is what Congress intended.

Mr. Iversen: Of course, the Government, however, is supplying facilities, actual urban facilities, here which somebody is entitled to some credit on. They shouldn't be charging these back to these enlisted men because they are the sort of thing that the Government has furnished streets and sidewalks and sewers and special policing and all that sort of thing, and it just hasn't been made contingent upon whether the particular municipality supplies those things, [328] because those are the things which might be supplied if the Government was not supplying them. We don't know what Grant County would have done if you had this many people in this concentrated area actually living here without Grant County supplying them, maybe Grant County would have supplied those things, we don't know.

Mr. Klasen: How they clarify them, you see, your taxes are computed on mills and, then, in addition like the City of Spokane levies anywhere up to fifteen mills because you are in a City and those taxes go to pay for the Police Department, and what not. In other words, your taxes are higher in the City because of the additional millage which goes directly to the City which does not in this case happen because there was no millage for these taxes for services which would be rendered, as they set forth, as the Larson Air Force Base existed inside the city limits of Moses Lake, then, there would have been an additional fifteen mills which would have been used for some of the services that they have used for a setoff, that is how the situation arose.



The Court: I feel this way about it, that since, I feel that I should in this case and under these circumstances go into the correctness or accuracy or propriety of the determination, the offset by the Secretary, the board or subordinate to whom he delegated the authority, I shouldn't make findings on the basis of what I might have done if I had come [329] to that conclusion. It certainly wouldn't be proper to put in a finding of one fact that the County thinks is material and helpful to its side of the case and deny defendants here factual findings that they think might be helpful and pertinent on this point, such as the population and the concentration of people in a given area and the simulation of urban conditions, and all of that. I think that I just have to leave that out so far as the findings are concerned, and I think the facts are available, either in the record or as a matter of judicial knowledge. The County, ordinarily, doesn't under the statutes of the State supply water systems and such as that, paved streets and sidewalks.

Mr. Felix: Now, there is one further matter that I have to bring to the attention of the Court relative to the judgment and I can't, of course, say whether either side will appeal but I would say it appears very likely.

The Court: I would say it is very likely that both sides would appeal, if you ask me.

Mr. Felix: And it would appear, also, that the best way for the judgment to read would be to hold the funds in the registry of the Court until the final determination of the case rather than have to reim-

burse the funds partially to Grant County and require the entity to sue for a refund in the event it fails. On the other hand, if the County prevails, require the County to sue the corporate defendant if [330] it is still not resolved to recover what had been gained, if the judgment had been correct, assuming that we prevail on the appeal. Supersedeas bonds, of course, are available but there is a good deal of money involved in here, and it will be an expense to both parties. I don't have any particular solution to suggest.

The Court: Well, it would be, probably, oh, a year and a half or two years before this case should be decided in the Court of Appeals. It takes about that long for them to get there and back, and during this time all this money would be drawing no interest. If it is in the registry of the Court here, it would be just simply lost to both parties and I don't think this is different from the run of the mill lawsuit, that it is the party who is requesting the Court's judgment who wishes to maintain the status ~~quo~~, they should put up a supersedeas bond, what is your thought on that, Mr. Iversen?

Mr. Iversen: We would like to see if there is some way that we could arrange so that we could get some interest on this money.

Mr. Felix: How about placing it in escrow?

The Court: We had one here, what did we do in that one, put it in Government bonds, didn't we?

Clerk of the Court: No, we put it in a savings & loan. The parties appointed me as their individual trustee [331] to handle the fund for them.

Mr. Felix: I might tell you I represent the Washington Toll Bridge Authority in an action brought by the United States Government for the alleged transportation taxes on a ferry system and the State of Washington and United States have entered into an escrow agreement whereby the money has been deposited with an escrow agent, the National Bank of Commerce, with certain directions to invest it in certain types of securities, primarily Government bonds, and to hold it pending the outcome of the case.

Mr. Iversen: I think we might be able to work out something like that. I think it would be rather silly to hold it here without interest.

The Court: I have such a Scotch ancestry that I shudder at the thought of all this money laying here for a year or a year and a half or two years.

Mr. Iversen: I rather think we can stipulate on something like that. It might be possible to have the Clerk to act as escrow.

The Court: There is a practical difficulty there, Mr. Taylor just graduated from Law School here and while I will regret to think about it and would like to keep him on he may go out into practice, I would say very likely, before your case would be determined by the Court of Appeals.

Mr. Iversen: We might work out some stipulation, I [332] think we can probably do that. We can stipulate some way and designate someone.

The Court: What was the amount of that deposit in the savings & loan?

Clerk of the Court: Oh, it was, approximately, six thousand.

The Court: You see that is under the six thousand covered by the guaranty. I wouldn't want to take the responsibility for putting this in a savings and loan. It is too much.

Mr. Felix: We have at the present time in a case I am interested in which is before Judge Boldt, in the Western District, I think there is about \$260,000.00, and that is accruing at about the rate of \$30,000.00 per quarter, and we anticipate a long, hard siege on that.

Mr. Iversen: We might be able to put it into Government bonds if we can designate the Old National Bank, or somebody, as a trustee to invest it in Government bonds.

Mr. Felix: I think that would be the wise thing to do.

Mr. Iversen: I wonder if we can't leave that to stipulation?

The Court: The difficulty is if I sign this judgment, it directs the Clerk to pay it out.

Mr. Iversen: Can't we stipulate on it? [333]

Mr. Felix: I think the judgment should read something to the effect that the Clerk should pay the money to the trustee designated by the stipulation of the parties and approved by the Court.

Mr. Iversen: The trouble of putting it into the judgment, let us suppose one or both of us would decide not to appeal here. You see, if we put it into the judgment we get it involved in the appeal.

Clerk of the Court: Why don't you just show in

the judgment that the Clerk is directed not to pay the money to anyone until the further order of the Court?

The Court: I don't see anything wrong with that. I can always enter the order if you can't agree, or if you agree that it should be paid out, why, all you would have to do is enter a separate order.

Mr. Iversen: Supposing we simply interline that, that the Clerk shall not make a disbursement until the further order of the Court.

The Court: I think you had better take it down there so that you gentlemen can agree on the language.

Mr. Iversen: Interline

"The Clerk shall not reimburse said amounts until the further order of the Court."

Clerk of the Court: Mr. Iversen, I need an extra copy of the judgment. [334]

Mr. Iversen: Will that do? We ran out of numbered copies.

The Court: All right, anything else?

Mr. Felix: No, not at this time.

The Court: Do you plan to put in objections?

Mr. Felix: I think I will propose a proposed amendment relative to the distraint proceedings which were taken by the County Treasurer, that were enjoined. I haven't, really, decided yet how valuable that will be, and I may renew my other proposals. I am not certain as yet, but they can be done in ten days easy enough and they can be mailed to you and mailed to Mr. Iversen.

The Court: Yes, you will have the ten days under the rule.

Mr. Felix: Okay.

The Court: Yes, I think it would be best to mail them here because I may be in Walla Walla or Pasco or Yakima, I don't know.

(Whereupon, court was adjourned until July 8, 1958, at 9:30 o'clock a.m.) [335]

[Endorsed]: Filed October 8, 1958.

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[Endorsed]: No. 16234. United States Court of Appeals For the Ninth Circuit. Moses Lake Homes, Inc., Appellant, vs. Grant County, Washington, Appellee. Grant County, Washington, Appellant, vs. Moses Lake Homes, Inc., Appellee. Transcript of Record. Appeals From the United States District Court For the Eastern District of Washington, Northern Division.

Filed: October 29, 1958.

Docketed: November 4, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals For the Ninth Circuit.



United States Court of Appeals  
For the Ninth Circuit

No. 16234

MOSES LAKE HOMES, INC., Appellant,

vs.

GRANT COUNTY, WASHINGTON,  
Respondent and Cross-Appellant.

STATEMENT OF POINTS TO BE RELIED  
UPON BY MOSES LAKE HOMES, INC.

Moses Lake Homes, Inc. will, upon the Appeal of the above matter, rely upon the following points:

1. Grant County had no perfected interest in the property taken nor in the estimated compensation.

2. No tax has ever been validly levied upon the property taken.

3. No claim of Grant County could be allowed out of the deposit of estimated compensation.

4. The Court erred in allowing Grant County a portion of the estimated compensation.

LYCETTE, DIAMOND &  
SYLVESTER,

/s/ By LYLE L. IVERSEN,

Attorneys for Appellant, Moses Lake  
Homes, Inc.

Acknowledgment of Receipt of Copy Attached:

[Endorsed]: Filed November 6, 1958. Paul P.  
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS  
OF RECORD ON APPEAL

Moses Lake Homes, Inc. hereby designates the following portions of the record to be contained in the record on Appeal:

1. Complaint.
2. Petition of Moses Lake Homes, Inc. for Order Directing Payment of Money.
3. Petition of Grant County, Washington for Order Directing Payment of Money.
4. Requests for Admissions (by Defendants, Moses Lake Homes, Inc. et al. to Grant County).
5. Reply of Grant County to Requests for Admissions.
6. Requests for Admissions (by Grant County to Moses Lake Homes, Inc. et al.).
7. Responds of Moses Lake Homes, Inc. to Requests for Admissions.
8. Second Request for Admissions.
9. Response to Second Request for Admissions.
10. Findings of Fact and Conclusions of Law on Petition for Order Directing Payment of Money.
11. Judgment for payment of estimated Compensation.
12. Order denying Motion for New Trial or in the Alternative for the Taking of Additional Evidence.
13. Order denying Motion for Amendment and for Additional Findings of Fact and Conclusions of Law and Judgment.

14. Motion for Disbursement of Estimated Compensation.
15. Order Directing Payment of Funds.
16. Notice of Appeal (by Moses Lake Homes, Inc.).
17. Bond on Appeal.
18. Statement of Points to be Relied upon by Moses Lake Homes, Inc.

LYCETTE, DIAMOND &  
SYLVESTER,

/s/ By LYLE L. IVERSEN,

Attorneys for Appellant, Moses Lake  
Homes, Inc.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed November 6, 1958. Paul P.  
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

**STATEMENT OF POINTS TO BE RELIED ON  
BY GRANT COUNTY, WASHINGTON**

Grant County, Washington, upon the Appeal of the above matter, relies upon the following points:

1. Moses Lake Homes, Inc., Larson Heights, Inc., and Larsonaire Homes, Inc., were the owners of certain taxable leaseholds in real property and were the owners of in fee or of the beneficial interests in the improvements thereon, all of which was taxable and taxed by Grant County, Washington.
2. The taxes levied and to be levied by Grant

County were valid and should be paid out of the deposit of estimated compensation.

3. The determination by the Secretary of the Air Force that the United States provided services which would otherwise be provided by taxes is both legally and factually in error and said determination was improperly applied by the Court.

4. There is insufficient evidence in the record for the Court to be able to enter Judgment.

5. As between the Appellant and Cross-Appellant, the tax liability of Moses Lake Homes, Inc., as to the property taken is *res judicata*.

6. The Court erred in not recognizing the tax claims of Grant County as against the claims of Moses Lake Homes, Inc., Larson Heights, Inc., and Larsonaire Homes, Inc., and in failing to order said claims paid out of the deposit of estimated compensation.

7. The Court erred in awarding Judgment to Moses Lake Homes, Inc., different and other than that asked in its Petition.

8. The Court erred in failing to award interest to Grant County measured from the time the taxes were due and payable.

9. The Court erred in holding Grant County's taxes were not applicable to or a lien upon the property and/or interests thereon of Moses Lake Homes, Larson Heights, Inc., or Larsonaire Homes, Inc., and that the State of Washington follows a differ-

ent method of evaluating Wherry Housing Projects for taxation than other similar properties of similar value.

FELIX & ABEL and  
PAUL A. KLASSEN, JR.,

/s/ By JENNINGS P. FELIX,  
Counsel for Appellee and Cross-Appellant, Grant  
County, Washington.

[Endorsed]: Filed November 12, 1958. Paul P.  
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF  
RECORD ON CROSS-APPEAL

Comes now the Cross-Appellant herein, Grant County, Washington, by and through its counsel of record, and hereby designates as the contents of the record on Cross-Appeal the complete record and each and every portion thereof of all proceedings, minute entries, argument and rulings of the Court in the action, including but not limited to the following:

1. Complaint;
2. Declaration of Taking;
3. Certified Copy of Department of Air Force letter;
4. Affidavit of G. F. Maguire;
5. Notices of Condemnation and Returns of Service;

6. Affidavits of Mailing;
7. Notices of Appearance of Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc.;
8. Lis Pendens;
9. Motion for Temporary Restraining Order;
10. Temporary Restraining Order;
11. Marshal's returns thereof;
12. Notice of Appearance of Grant County, Washington;
13. Motion to Extend Time for Hearing and supporting affidavits;
14. Order Extending Time for Hearing;
15. Personal Property Tax Lien and Assessment Lien Statement;
16. Disclaimer of National Bank of Commerce;
17. Stipulation re Preliminary Injunction;
18. Order granting Preliminary Injunction;
19. Petition of Moses Lake Homes, Inc., for Order Directing Payment of Money;
20. Petition of Larsonaire Homes, Inc., for Order Directing Payment of Money;
21. Petition of Larson Heights, Inc., for Order Directing Payment of Money;
22. Notice of Appearance of Federal National Mortgage Association;
23. Petition of Grant County, Washington, for Order Directing Payment of Money;
24. Disclaimer by Security Mortgage, Inc.;



25. Request for Admissions by Grant County, Washington;

26. Response of Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., to Request for Admissions plus attached Exhibits;

27. Second Request for Admissions filed on behalf of Grant County, Washington;

28. Response of Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., to Second Request for Admissions by Grant County, Washington;

29. Request for Admissions by Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc.;

30. Reply of Grant County, Washington to Request for Admissions;

31. Answer of Federal National Mortgage Association;

32. Findings of Fact and Conclusions of Law on Petition for Order Directing Payment of Money, dated July 3, 1958;

33. Judgment for Payment of Estimated Compensation;

34. Appearance of Special Counsel for Grant County, Washington;

35. Motion for Amendment and for Additional Findings of Fact, Conclusions of Law and Judgment, dated July 11, 1958;

36. Proposed Additional Findings of Fact and Conclusions of Law;

37. Proposed Amended Judgment;

38. Motion by Grant County, Washington for New Trial or in the Alternative, for the Taking of Additional Evidence;

39. Order Denying Motion for New Trial or in the Alternative for the Taking of Additional Evidence, dated July 23, 1958;

40. Order Denying Motion for Amendment and for Additional Findings of Fact, Conclusions of Law and Judgment, dated July 23, 1958;

41. Motion by Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., for disbursement of estimated compensation;

42. Order Directing Payment of Funds, dated July 28, 1958;

43. Notice of Appeal by Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc.;

44. Cost Bond and Supersedeas Bond;

45. Notice of Appeal of Grant County, Washington;

46. Supersedeas and Cost Bond for Grant County, Washington;

47. Motion of Grant County to Order the Repayment of Funds into the Registry of the Court;

48. Motion to Approve Supersedeas Bond on Appeal of Grant County, Washington, or in the Alternative set the Bond, and attached documents;

49. Minute Entries of hearing on June 26, 1958;

50. Reporter's stenographic transcript of the complete proceedings and oral decision of the Court on June 26, 1958, on file herein;

51. Minute Entries of hearing on July 3, 1958;
52. Reporter's stenographic transcript of the complete proceedings and oral decision of the Court on July 3, 1958, on file herein;
53. Grant County Exhibit A (copies of Grant County Superior Court file No. 8788);
54. Grant County Exhibit B (copies of Grant County Superior Court file No. 8095);
55. Grant County Exhibit C (detail lists of assessments of personal property);
56. Grant County Exhibit D (photocopies of determination of taxes and certificate);
57. This designation;
58. Designation of Moses Lake Homes, Inc.;
59. Statement of Points to be Relied on by Moses Lake Homes, Inc.; and
60. Statement of Points to be Relied on by Grant County, Washington.

Dated November 7, 1958.

FELIX & ABEL and  
PAUL A. KLASSEN, JR.,

/s/ By JENNINGS P. FELIX,  
Counsel for Appellee and Cross-Appellant, Grant  
County, Washington.

[Endorsed]: Filed November 12, 1958. Paul P.  
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

## ORDER

On Motion to Order Repayment of Funds into Registry of Court, and to Substitute Bonds.

Before: Pope, Hamley, and Hamlin, Circuit Judges.

The motion of Grant County, Washington, cross-appellant herein, for an order directing that funds heretofore disbursed to Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., be repaid into the registry of this court, is denied.

The motion of Moses Lake Homes, Inc., for an order permitting it to substitute a cost bond in the sum of not less than two hundred fifty Dollars (\$250) for its supersedeas bond is granted. Grant County, Washington, is likewise given permission to make such a substitution of bonds.

/s/ WALTER L. POPE,  
Circuit Judge,

/s/ FREDERICK G. HAMLEY,  
Circuit Judge,

/s/ O. D. HAMLIN,  
Circuit Judge.

[Endorsed]: Filed January 2, 1959. Paul P. O'Brien, Clerk.

[fol. 341]

IN UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MINUTE ORDER OF ARGUMENT AND SUBMISSION—  
September 21, 1959 (omitted in printing)

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[fol. 342]

IN UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND  
FILING AND RECORDING OF JUDGMENT—January 25, 1960  
(omitted in printing).

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[fol. 343]

IN UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 16,234

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MOSES LAKE HOMES, Inc.; Appellant,

vs.

GRANT COUNTY, Appellee and Cross-Appellant,  
LARSONAIRE HOMES, INC., LARSON HEIGHTS, INC., and  
MOSES LAKE HOMES, INC., Cross-Appellees.

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Appeal from the United States District Court for the  
Eastern District of Washington  
Northern Division

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OPINION—January 25, 1960

Before: Barnes, Hamley, and Jertberg, Circuit Judges  
Hamley, Circuit Judge:

This proceeding is collateral to a federal condemnation  
action now pending in the district court. It involves the

claim of Grant County, Washington, to a substantial part of the sums deposited in court by the government as estimated compensation. The claim, resisted by the three condemnees, is for unpaid personal property taxes assertedly levied against the leaseholds which are being condemned.

The federal district court entered a judgment granting the county's claim in part. Moses Lake Homes, Inc., one of the condemnees for whom the sums were deposited, has appealed. Grant County has cross-appealed against all three condemnees.<sup>1</sup>

[fol. 344] The questions here presented are whether the tax liens on which the county relies are valid under state law and if so what part, if any, of the taxes thereby secured may be collected in view of the restrictions imposed by section 511 of the Housing Act of 1956.<sup>2</sup>

The condemnees, in addition to Moses Lake, are Larsonaire Homes, Inc., and Larson Heights, Inc. All three were sponsors of Wherry Act housing projects on Larson Air Force Base in Grant County, Washington. As sponsors they entered into separate leases with the United States pursuant to sections 801 to 809 of Title VIII of the National Housing Act, 12 U.S.C.A. §§ 1748, 1748a to h. The Moses Lake lease was entered into on May 31, 1950, the Larsonaire lease on August 6, 1953, and the Larson Heights lease on August 2, 1954.

By the terms of each lease the respective lessees were to erect, maintain, and operate on the military reservation a housing project for a period of seventy-five years unless sooner terminated by the government. The projects were financed by F.H.A. insured loans. The housing units were to be leased to military and civilian personnel assigned by the military commander.

<sup>1</sup> The judgment did not terminate the condemnation action since the issues to be determined in fixing final compensation were not adjudicated. The court, however, made the express determination and direction provided for in Rule 54(b), Federal Rules of Civil Procedure, 28 U.S.C.A. This court therefore has jurisdiction to entertain the appeal and cross-appeal.

<sup>2</sup> Enacted August 7, 1956, 70 Stat. 1110, 42 U.S.C.A. § 1594, Historical Note.



Under the terms of these leases the buildings and improvements, as completed, became real estate and property of the United States. Upon expiration of the leases or their earlier termination all such improvements were to remain the property of the government without further compensation. Since the completion of the buildings and improvements and until March 1, 1958, the respective sponsors operated the rental housing projects in the manner contemplated by the leases.

In June 1954 the assessor of Grant County listed the physical improvements placed upon the land by Moses Lake Homes, Inc., on his "Detail and Assessment List," for 1955 taxes. Moses Lake brought an action in the Superior Court of the State of Washington for Grant County to enjoin the levy of any taxes on its housing units for the year 1955 or thereafter. An injunction as prayed for was entered, and Grant County and the State of Washington appealed to the state supreme court. In a decision rendered on June 28, 1956, the supreme court [fol. 345] reversed and remanded the case for a new trial because the trial court had not permitted the State of Washington to intervene. *Moses Lake Homes v. Grant County*, 49 Wn.2d 182, 299 P.2d 840.

Following the second trial, a judgment enjoining Grant County from levying any taxes on the housing units of Moses Lake for the year 1955 or thereafter was again entered. Grant County and the State of Washington once more appealed. In its second decision, the Washington Supreme Court held that in view of *Offutt Housing Co. v. County of Sarpy*, 351 U.S. 253, a tax on the leasehold could be measured by the value of the buildings. The judgment enjoining the levying of such taxes for 1955 and subsequent years was accordingly reversed. *Moses Lake Homes v. Grant County*, 51 Wn.2d 285, 317 P.2d 1069, decided November 14, 1957. The injunction was dissolved in December 1957.

Thereafter and before the end of 1957, Grant County levied on the Moses Lake property for 1955 taxes pursuant to the assessment previously made. Before the end of 1957 the county also listed and levied upon the Wherry Act property of Moses Lake for the years 1956, 1957, and 1958.

At the same time it listed and levied upon the Wherry Act property of Larsonaire for the years 1956, 1957, and 1958, and upon the like property of Larson Heights for the years 1957 and 1958.<sup>3</sup> The listing was done on detail lists of personal property as omitted property for those years, pursuant to Revised Code of Washington 84.40.080.

On January 21, 1958, the county treasurer issued distraint and tax sale notices describing the improvements on the Wherry Act housing projects operated by the three [fol. 346] companies in question.<sup>4</sup> On March 1, 1958, the United States instituted a condemnation suit in the United States District Court for the Eastern District of Washington, seeking to acquire the described leasehold interests of Moses Lake, Larsonaire, and Larson Heights. At the same time a declaration of taking was filed, in connection with which the government deposited \$253,000 in the registry of the court as estimated compensation.<sup>5</sup>

On March 12, 1958, the government applied for and obtained an order temporarily restraining Grant County from proceeding with the tax sale referred to above. This restraining order was superseded on March 28, 1958, by a preliminary injunction to the same effect.

Petitions on behalf of the condemnees were filed with the district court on March 26, 1958, requesting orders directing payment to them of the respective amounts deposited in the registry of the court. On April 8, 1958, Grant County

<sup>3</sup> The taxes thus levied for the indicated years are as follows:

| Year | Moses Lake | Larsonaire | Larson Heights |
|------|------------|------------|----------------|
| 1955 | \$21,150   |            |                |
| 1956 | 32,925     | \$21,750   |                |
| 1957 | 31,330     | 18,798     | \$18,798       |
| 1958 | 22,575     | 14,145     | 14,145         |

In addition, Grant County later sought to levy taxes against each of the sponsors for 1959 in the following sums: Moses Lake, \$22,575; Larsonaire, \$14,145; and Larson Heights, \$14,145.

<sup>4</sup> The tax years dealt with in these distraint and tax sale notices are as follows: Moses Lake, 1955, 1956, and 1957; Larsonaire, 1956 and 1957; and Larson Heights, 1957.

<sup>5</sup> The deposited sum was allocated between the leasehold interests of the three condemnees as follows: Moses Lake, \$126,500; Larsonaire, \$65,300; Larson Heights, \$61,200.

petitioned the district court for an order directing payment to it of most of the \$253,000 which had been deposited by the government.<sup>6</sup>

[fol. 347] The hearing on these counterclaims led to entry on July 3, 1958, of the judgment here under review.<sup>7</sup> As before noted, the tax claims were denied except as to Moses Lake for the years 1955 and 1956. The petitions of the condemnees were granted in full except for a deduction in the case of Moses Lake sufficient to pay 1955 taxes in the sum of \$21,150, and 1956 taxes in the sum of \$32,925, together with interest.

### *Appeal of Moses Lake Homes, Inc.*

We first consider the appeal of Moses Lake from that part of the judgment which allowed the tax claims against it for the years 1955 and 1956. Appellant contends that for

<sup>6</sup> With regard to Moses Lake, the county's claim was based on asserted unpaid taxes in the total amount of \$130,555 for the years 1955 through 1959, together with interest in the sum of \$11,730.73 to March 1, 1958, for the years 1955 through 1957. The total amount so claimed against Moses Lake was \$142,285.73, which is in excess of the amount deposited for that condemnee by the United States. See footnote 5.

With regard to Larsonaire, the county's claim was based on asserted unpaid taxes in the total amount of \$68,838 for the years 1956 through 1959. The total amount so claimed against Larsonaire was thus in excess of the amount claimed by Larsonaire (\$65,300) deposited for that condemnee. See footnote 5. With regard to Larson Heights, the county's claim was based on asserted unpaid taxes in the total amount of \$47,088 for the years 1957 through 1959. The total amount so claimed against Larson Heights was thus \$14,112 less than the \$61,200 which had been deposited for that condemnee. See footnote 5.

The aggregate of the unpaid taxes and interest which was made the basis of the county's claim against the funds deposited for the three condemnees was \$258,211.73. However, by reason of the distribution of the deposited funds as between the condemnees, the county's total recovery, if it had prevailed completely, would have been \$238,888. The only portion of the deposit which would not have gone to the county would have been the \$14,112 balance to the credit of Larson Heights.

<sup>7</sup> Preparatory to the hearing on these motions, requests for admissions and responses thereto, together with certain exhibits, were filed. Additional exhibits were received at the hearing.

either one of two reasons the court erred in allowing the county's claim for those years. The first such reason, according to appellant, is that no tax was validly levied for 1955 or 1956 upon the Moses Lake property taken in the condemnation proceeding.

The condemnation action is one to condemn leasehold interests, together with associated easements and contract rights. The government is not condemning physical improvements on the military reservation. Under the terms of the lease it already owns those improvements. It follows that if Grant County has an enforceable claim against the deposited sums for 1955 and 1956 taxes it must be based on a valid levy against the leasehold interest of Moses Lake for those years and a tax lien arising therefrom.

Appellant argues that Grant County did not undertake to levy taxes against the leasehold interest of Moses Lake for 1955 or 1956 taxes. Instead, it is asserted, the county made an attempt to levy a tax for those years upon the physical improvements which Moses Lake constructed on the leasehold. This attempt was abortive, it is contended, because the improvements became the property of the government as soon as they were completed, and so Moses Lake had no interest therein which could be taxed.<sup>8</sup>

[fol. 348] In support of this argument appellant points to RCW 84.40.020, which provides that all personal property subject to taxation shall be listed and assessed every year.<sup>9</sup> It is provided in RCW 84.40.050 that the tax commission shall prescribe suitable forms of detail and assessment lists or schedules to be used by assessors for the listing, assessment, and equalization of property for tax purposes.

<sup>8</sup> Unnecessary to support this contention is Moses Lake's further contention that under the common law of Washington buildings permanently erected on real property are real property. With respect to improvements upon lands owned by the United States, RCW 84.04.080 provides a different rule. See footnote 9, *infra*.

<sup>9</sup> As defined in RCW 84.04.080, personal property includes "all leases of real property and leasehold interests therein for a term less than the life of the holder; [and] all improvements upon lands the fee of which is still vested in the United States. . . ."

In listing and assessing the property here in question for 1955 and 1956 taxes, the county assessor apparently used the forms prescribed by the tax commission pursuant to RCW 84.40.050. However, he made no entry on these forms under item 28 entitled "Leaseholds." Instead, the listing was made under item 27 entitled "Improvements upon land the fee of which is vested in the United States, the state, or any political subdivision thereof."<sup>10</sup> At no stage in the subsequent taxing procedure with respect to these years was any reference made to leasehold interests. As before noted, the distraint proceedings later instituted were purportedly directed against the physical improvements and not the leasehold interest of Moses Lake.

Grant County argues that the doctrine of res judicata precludes Moses Lake from attacking the validity of the 1955 and 1956 levies on the ground referred to above, or on any other ground. The county points out that in the prior state court proceedings referred to above Moses Lake unsuccessfully attacked the validity of these levies.

In the first appeal in the state court action challenging these levies, Moses Lake contended that the county was attempting to levy and collect an ad valorem tax on the buildings, whereas only the leasehold was subject to tax. This is precisely the same contention which Moses Lake advances in the instant suit. In the state court action, however, the contention referred to was not grounded on [fol. 349] the point here made, that incorrect entries were made on the detail and assessment lists. The latter point is nevertheless one which Moses Lake could have made in the state court action.

In the second appeal in the state court action the attack upon the validity of the levies was construed by the state supreme court as being based on a somewhat different contention. This was the contention that the levies were invalid because the county sought to measure a tax on a leasehold by the value of the buildings. But, again, Moses Lake did not argue, though it could have, that the levies

<sup>10</sup> In the case of Moses Lake the assessment noted under item 27 in the Detail List of Personal Property was \$500,000, with this notation on the reverse side: "This listing covers 400 rental units at Larson Air Force Base near Moses Lake, Wash."



were invalid because improper entries were made on the detail and assessment lists.

A judgment upon the merits in a state court action is ~~res judicata in a subsequent federal court action~~ where the parties and subject matter are the same. This is true not only with regard to matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end. *Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470.

It is therefore our view that the judgment of the Washington Supreme Court upholding the validity of the levies "for the year 1955 and thereafter"<sup>11</sup> is res judicata on the question here raised as to the validity of those levies. Regardless of the manner in which entries were made on the detail and assessment list, we therefore hold that the levies against Moses Lake for 1955 and 1956 taxes were validly directed against the company's leasehold interest.

This being the nature of the levies, the validity thereof is not open to challenge on the ground that the value of the leasehold was measured by the value of the improvements. *Offutt Housing Co. v. County of Sarpy*, supra; *Moses Lake Homes v. Grant County*, 51 Wn.2d 285, 317 P.2d 1069.

The alternative reason advanced by Moses Lake why the court erred in allowing the county's claim against the funds deposited for Moses Lake, based on unpaid taxes for 1955 and 1956, is that the collection of the taxes for those years [fol. 350] is forbidden, under the circumstances of this case, by section 511 of the Housing Act of 1956.

Section 511 amends section 408 of the Housing Amendments of 1955, 69 Stat. 653, to provide that no state or local taxes on Wherry Housing project lessees from the United States, "not paid or encumbering such property or interest prior to June 15, 1956," shall exceed the amount of taxes or assessments on other similar property of similar value,

<sup>11</sup> *Moses Lake Homes v. Grant County*, 51 Wn.2d 285, 317 P.2d 1069.



less specified offsets as determined by the Secretary of Defense or his designee.<sup>12</sup>

The trial court held that the restrictions on taxation imposed by section 511 do not apply with regard to the 1955 and 1956 taxes levied against the leasehold of Moses Lake. This ruling was based on the view that the liens for those taxes are to be regarded as encumbering the leasehold prior to June 15, 1956.

In reaching this conclusion the court expressed the opinion that taxes do not become a lien until levied, and noted that the taxes for 1955 and 1956 were not levied until December 1957. But, the court stated, the levies for 1955 and 1956 taxes would have been made in October 1954 and 1955, respectively, but for the injunction, later proved to be erroneous, obtained by Moses Lake. Under these [fol. 351] special circumstances, it was held, the liens for 1955 and 1956 taxes should be regarded as encumbering the property prior to June 15, 1956.

Appellant argues that it is immaterial what brought about the situation that delayed the perfecting of the liens

<sup>12</sup> Section 511 reads in its material portion as follows:

"Sec. 511. Section 408 of the Housing Amendments of 1955 is amended by adding at the end thereof the following: 'Nothing contained in the provisions of title VIII of the National Housing Act in effect prior to August 11, 1955, or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by a mortgage insured under such provisions of title VIII. *Provided*, That, no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other services or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to such other similar property.' . . ."

for 1955 and 1956 taxes until after June 15, 1956. The fact remains and is here controlling, appellant asserts, that the liens for those years did not come into existence so as to encumber the property until after June 15, 1956. It is pure speculation, appellant also contends, whether in the absence of the injunction the levies would have been made prior to that date.

We will first consider the lien for 1955 taxes. In June 1954 the county assessor listed and placed a valuation on the Moses Lake property for purposes of levying the 1955 tax thereon. The property so listed and valued then became subject to RCW 84.60.030, the applicable part of which reads as follows:

"The taxes assessed upon each item of personal property assessed shall be a lien upon such personal property from and after the date upon which it is listed with and valued by the county assessor, and no sale or transfer of such property shall in any way affect the lien of such taxes thereon."

The lien referred to in RCW 84.60.030, however, is only inchoate at the time of listing and valuation. See *State of Washington v. Snohomish County*, 71 Wash. 320, 128 Pac. 667. It is not enforceable until there is a valid tax for that year which the lien may secure. There can be no valid tax until there has been a levy specifying the amount thereof. *Puget Sound & Light Co. v. Cowlitz County*, 38 Wn.2d 907, 234 P.2d 506, 511. If no 1955 tax had been thereafter levied, or if the property had passed into public ownership prior to such levy, the lien for 1955 taxes would never have matured into an enforceable lien. But in the meantime, and unless defeated by one of these circumstances, it was an encumbrance upon the property which prevented third persons from gaining intervening rights.

The lien for 1955 taxes on the Moses Lake leasehold was not defeated by failure to levy a tax or by passage of the leasehold into public ownership. A tax on this leasehold for 1955 taxes was levied in December 1957, following dis-[fol. 352] solution of the injunction. When the levy was made the leasehold in question remained in private owner-

ship.<sup>13</sup> The levy was therefore valid and upon being made became effective by relation back to the time when the inchoate lien first came into existence.<sup>14</sup>

We hold that an inchoate tax lien, in existence prior to June 15, 1956, which thereafter becomes fully effective by relation back from the date of a subsequent valid levy, is a tax encumbrance prior to June 15, 1956, within the meaning of section 511. It follows that the 1955 taxes levied against the leasehold of Moses Lake are not affected by the restrictions imposed by section 511.

With regard to the 1956 taxes levied against the leasehold of Moses Lake, the facts are different. By reason of the injunction obtained by Moses Lake in the late summer or early fall of 1954, the leasehold was not listed and valued for 1956 until December 1957. It follows that no inchoate lien came into existence prior to June 15, 1956. In our view, however, the taxes which in the normal course of statutory procedure would have encumbered a taxpayer's property or interest prior to June 15, 1956, are to be regarded as having done so, where such is prevented only by procedural obstacles interposed by the taxpayer. Congress could not have intended that taxpayers may, by instituting misconceived injunction proceedings, deny state and local governments the benefit of the June 15, 1956, saving clause included in section 511.

The view just expressed is based upon the assumption that but for the injunction the assessor would have listed and valued the leasehold for 1956 taxes prior to June 15, 1956. It was his statutory duty under RCW 84.40.040 to do this between December 1, 1954, and May 31, 1955. He performed the similar statutory duty in the preceding year, and the attorneys representing Moses Lake apparently thought that he would do so again unless enjoined. In view of these circumstances, we do not regard the assumption we have made as unduly speculative.

[fol. 353] For the reasons indicated, it is our opinion that the 1956 taxes levied against the leasehold of Moses Lake

<sup>13</sup> The declaration of taking was not filed until March 1, 1958.

<sup>14</sup> For other examples of the doctrine of relation back, as applied to tax liens arising under somewhat analogous statutes, see *United States v. Alabama*, 313 U.S. 274; *United States v. Sampson*, 9 Cir., 153 F.2d 731; *Allen v. Bemis*, 99 N.H. 247, 108 A.2d 549.

as well as the 1955 taxes, are not affected by the restrictions imposed by section 511.<sup>15</sup>

This disposes of the questions raised on the appeal of Moses Lake, and calls for an affirmance of that part of the judgment which recognizes the county's claim against the funds deposited for Moses Lake based on taxes levied against that company for 1955 and 1956.

### *Cross-Appeal of Grant County*

We turn now to the cross-appeal of Grant County. The county cross-appeals from that part of the judgment which disallows its tax claims against the deposited funds for the 1957 through 1959 taxes levied against Moses Lake, the 1956 through 1959 taxes levied against Larsonaire, and the 1957 through 1959 taxes levied against Larson Heights.

The trial court disallowed the tax claims against the three condemnees for these years on the ground that the collection of such taxes is subject to the restrictions imposed by section 511 and that in view of those restrictions no such taxes were collectible.

We direct our attention first to the disallowed tax claims made against the funds deposited for Moses Lake.

For the reasons stated above, it is our view that the 1957 taxes levied against the leasehold of Moses Lake are not subject to the restrictions imposed by section 511. But for the injunction that leasehold would have been listed and valued for 1957 taxes prior to June 15, 1956. An inchoate lien would then have come into existence which, when the tax was thereafter levied, would have become fully effective, by relation back, to a date prior to June 15, 1956. By its own conduct in securing an injunction, Moses Lake prevented this inchoate lien from coming into existence prior to June 15, 1956. As in the case of the 1956 taxes on this leasehold, we will, under these circumstances, consider that a section 511 encumbrance attached prior to June 15, 1956. [fol. 354] We therefore hold that the trial court erred in

<sup>15</sup> It will be noted that the views expressed above, to the effect that the 1956 taxes levied against Moses Lake are not affected by section 511, apply with like effect to the 1955 taxes levied against that company.

disallowing the county's claim for 1957 personal property taxes against the funds deposited for Moses Lake.

With regard to the 1958 tax levied against Moses Lake, no inchoate lien could have come into existence prior to December 1, 1956. This was the first day on which the assessor, even if unrestrained by court order, could have listed and valued the leasehold for 1958 taxes. See RCW 84.40.040. Since no inchoate lien for 1958 taxes could have come into existence prior to June 15, 1956, the limitations on tax payments set out in section 511 apply thereto.

Under that section the amount of taxes or assessments on a Wherry Act housing project leasehold not paid or encumbering such property or interest prior to June 15, 1956, may not exceed the amount of taxes or assessments on other similar property of similar value less certain offsets.

The trial court held that under Washington law the valuation of leaseholds for tax purposes other than Wherry Act project leaseholds must be measured by the market value of the leasehold considered in the light of its burdens and benefits.<sup>16</sup> The court further held that with respect to Wherry Act leaseholds the valuation must be measured by the full value of the buildings and improvements.<sup>17</sup> The court concluded from this that under Washington law housing projects are levied upon a basis different and higher than the amount of taxes and assessments on other similar property of similar value.

At the oral argument counsel for Grant County contended that in Washington the rule that the value of non-Wherry Act leaseholds is to be measured by market value considered in the light of the burdens and benefits of the leasehold applies only where the improvements are of a kind which will outlast the leasehold. Where the improve-

<sup>16</sup> In support of this view concerning the Washington law, the court cited *In re Metropolitan Building Co.*, 144 Wash. 469, 258 Pac. 473; *Metropolitan Building Co. v. King County*, 72 Wash. 47, 129 Pac. 883; *Metropolitan Building Co. v. King County*, 62 Wash. 409, 113 Pac. 1114.

<sup>17</sup> See *Moses Lake Homes v. Grant County*, 51 Wn.2d 285, 317 P.2d 1069, in which the value of this same Wherry Act project leasehold was measured by the full value of the buildings and improvements.



ments will not outlast the lease, it was argued, the value [fol. 355] of the leasehold for tax purposes may be measured by the value of the improvements. *Percival v. Thurston County*, 14 Wn. 586, 45 Pac. 159, decided in 1896, was cited as authority for this proposition.

The *Percival* case is not in point. No lease was involved. Thurston County was seeking to levy an ad valorem tax upon improvements the taxpayer had built upon state-owned tidelands. The Metropolitan Building Company cases and this case, on the other hand, involve the taxation of leasehold interests. The trial court correctly held that the valuation rule applied in the Metropolitan Building Company cases is applicable with regard to all non-Wherry Act leaseholds.

The trial court's further finding that a different method was used in valuing the Wherry Act project leasehold here in question is also correct. Likewise to be sustained is the court's finding that the method used in assessing the Moses Lake leaseholds resulted in a higher tax than would have been true in the case of a non-Wherry Act leasehold.<sup>18</sup>

Under section 511, however, the fact that the taxes are higher does not invalidate the entire tax. It only requires that the amount collectible be reduced to what it would have been if the tax had been levied on a non-Wherry Act leasehold basis.

Hence, to give effect to this part of section 511, where it is found that the assessing method used was different and produced a higher tax it is also necessary to find the amount of the excess so that a partial or total offset may be effectuated. No such finding was here made, nor do we find any facts of record which would support such a finding.

<sup>18</sup> The Moses Lake leasehold was heavily encumbered by a mortgage. The amortization of this indebtedness was not taken into account in assessing the leasehold, as only the value of the physical improvements was considered. But had the valuation of the leasehold been measured by its market value considered in the light of its burdens and benefits, the necessity of amortizing the mortgage would have been taken into account. See *In re Assessment of Metropolitan Building Co.*, 144 Wash. 469, 258 Pac. 473, 476. Had it been taken into account, the assessed value for 1958 and therefore the levied tax would have been substantially lower, though we do not know how much lower.



[fol. 356] On the present state of the record, therefore, the conclusion reached by the trial court that utilization of a different assessment method called for disallowance of the county's 1958 tax claim against Moses Lake cannot be sustained.<sup>19</sup>

But the trial court also held that the claim against Moses Lake for 1958 taxes, as well as the claim against Moses Lake, Larsonaire, and Larson Heights for the other years referred to in footnote 19, must be disallowed because of the other offsets which were designated pursuant to section 511.

This ruling was based on a finding that on September 4, 1957, the authorized representative of the Secretary of the Air Force had determined that offsets totaling \$111,358.65 must be taken into account.<sup>20</sup> According to this finding, this

<sup>19</sup> The court also found that for the same reason it was necessary to disallow the county's 1957 tax claim against Moses Lake, its 1956, 1957, and 1958 tax claims against Larsonaire, and its 1957 and 1958 tax claims against Larson Heights. The view has been expressed above that section 511 does not apply to the 1957 tax claim against Moses Lake. The county's tax claims against the other two condemnees are discussed below.

<sup>20</sup> The Secretary's designation reads as follows:

"Department of the Air Force  
Washington

"Office of the Secretary

4 Sep 1957

#### DETERMINATION

"Subject: Determination under Section 408 of the Housing Amendments of 1955, as amended: Larson Air Force Base, Washington (FHA Projects Nos. 171-80001-7-8)

"1. I have considered the information with respect to the subject project, the lessee of which believes that the tax for 1956 will be equal to approximately \$65,000.00. Pursuant to my designation under Section 408 of the Housing Amendments of 1955, 69 Stat. 653, as amended by Section 511 of the Housing Act of 1956, 70 Stat. 1110, I have determined \$111,358.65 to be equal to (1) any payments made by the Federal Government to the local taxing or other agencies involved with respect to such property, plus (2) such amount as may be appropriate for expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, roads, sidewalks, curbs, gutters, water and sewer system, fire lines and hydrants, playgrounds, street lighting, fire

[fol. 357] sum was equal to the payments, as defined in clause (1) under the first proviso of section 511, made by the federal government to local taxing and other agencies involved with respect to the three leaseholds, plus the expenditures made by the federal government or the lessees

protection, garbage disposal, snow removal and sewer service, or any other service or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to other similar property of similar value. This determination is not to be considered an expression of opinion by me or the Department of Defense with respect to the validity or propriety of the tax bills to which it is applied.

"2. The items included in this determination are as follows:

"Payments for operation of schools pertaining to dependents living in Wherry projects pursuant to P. L. 874, 61st Congress: \$46,646.57.

"Funds paid under P. L. 615 for years January 1953 to June 1956, inclusive, \$94,092.00 depreciated at 4% \$3,763.68.

"Appropriate amounts for expenditures for services and facilities.

"Provisions by Air Force of streets, curbs, and sidewalks not including entrance walks and drives, cost \$65,658.56, amortized 25 yrs. life: \$2,626.35.

"Provision by lessees of streets and street signs, cost \$106,416.91, amortized 25 yrs. life: \$4,258.68.

"Provision by Air Force of water and sewer system, cost \$132,761.00, amortized 25 yrs. life: \$5,310.44.

"Provisions by lessees of curbs and sidewalks, cost \$103,726.51, amortized 25 yrs. life: \$4,149.06.

"Provision by lessees of water and sewer system, cost \$185,426.00, amortized 25 yrs. life: \$7,417.04.

"Expenditures by Lessee:

"Street lighting: \$1,708.80; Sewer charge: \$2,800.00; Sewer line maintenance: \$250.00; Street maintenance and repair: \$682.02; Street sanding: \$100.00; Playground maintenance: \$2,100.00.

"Expenditures by Air Force:

"Police Protection: \$23,248.00; Access Roads—Maintenance: \$6,300.00.

"3. The Chief, Family Housing Division, Directorate of Facilities Support, D.C.S./O., will make copies of this determination available to all interested parties.

"/s/ GEORGE S. ROBINSON  
Deputy Special Assistant for  
Installations"

for government facilities and services of the kind described in clause (2) under this proviso. The court further found that in making its assessments of taxes against the three lessees Grant County did not give any credit or consideration to this \$111,358.65 determination.

[fol. 358] The county, however, advances several reasons why in its opinion the Secretary's determinations are "totally useless" and should therefore have been disregarded by the court. The first of these is that the designated offsets were not segregated with regard to the individual taxpayers, but only an unsegregated designation covering all three leaseholds at Larson Air Force Base was made.

It is true that no segregation was made. The question is whether under section 511 such a segregation was required.

Some support for the county's view is to be found in the use in section 511 of such terms as "the interest of a lessee," "the interest of such lessee," "with respect to such property," and "the lessee." It can be argued that the use of the singular number in referring to Wherry Act lessees and Wherry Act project properties evidences an intent to require that the designation of offsetting payments and expenditures under clause (2) of the proviso be allocated as between individual lessees and leaseholds.

However, when regard is had to the underlying purpose of Congress in enacting this statute, we believe that such a construction of section 511 is not warranted. As indicated in the report of the House Committee on Banking and Currency on the bill which became the Housing Act of 1956,<sup>21</sup> this legislation was an outgrowth of the decision of the United States Supreme Court on May 28, 1956, in *Offutt Housing Company v. County of Sarpy*, 351 U.S. 253. The committee report points out that this decision upheld the right of local taxing officials to levy personal property taxes against the lessee's interest in a Wherry Act project, measured by the full value of the buildings and improvements.

It is stated in the committee report that a large portion of the projects have not been subjected to such local taxes

<sup>21</sup> House Report No. 2363, 84th Cong., 2d Session, accompanying H.R. 11742, 3 U. S. Code Congressional and Administrative News, 84th Cong., 2d Session, page 4509, at 4555-4556.

in the past, and as a consequence the federal government has frequently made payments to local taxing officials in lieu of taxes in exchange for usual services, such as schools, furnished to the projects. Moreover, as the report notes, many expenditures have been made by the federal government [fol. 359] for streets, utilities, schools, and for other services normally furnished by taxing bodies. Now that the right of local taxing agencies to tax such leaseholds has been recognized, the committee report states, it had become important "that no payments be made to communities which would constitute a windfall over and above normal taxes."

This purpose of avoiding windfalls to taxing communities could not be achieved unless all payments and expenditures of the kind described in clauses (1) and (2) of the proviso, made in connection with the operation of a particular military installation, were permitted to be set off against the taxes levied against Wherry Act leaseholds located thereon. For example, if with respect to a particular Wherry Act leasehold the aggregate of the clause (1) and (2) payments and expenditures is \$10,000, and the tax levied against the leasehold is \$5,000, the tax would be set off and a balance of \$5,000 would remain. Unless the government could set off this sum against the tax levied for the same year on another Wherry Act leasehold on the same military installation, the local taxing unit would receive a windfall in that amount.

Thus it is that the purpose of the enactment can be realized only if all such payments and expenditures are aggregated together in the Secretary's designation, without regard to the particular leaseholds situated on the military installation. If, as will undoubtedly occur in some cases, the clause (1) and (2) offsets are less than the taxes levied against all leaseholds on a particular base, an allocation of offsets as between lessees is necessary in order to compute their individual net taxes. But such an allocation is a matter of interest only to the taxing agency and the taxpayers, and so need not be dealt with in the Secretary's designation.

We accordingly hold that the designation of offsets here in question made pursuant to section 511 is not to be dis-

regarded because it did not allocate the offsetting items as between the three Wherry Act project lessees involved in this case.<sup>22</sup>

[fol. 360] The second objection which the county makes to the Secretary's designation of offsets in the amount of \$111,358.65 is that it is not limited to payments and expenditures made after June 15, 1956. The date referred to is that which is named in the first sentence of the proviso to section 511.<sup>23</sup> It is the county's contention that section 511 does not contemplate the designation as offsets of clause (1) and (2) payments and expenditures which were made before June 15, 1956.

Examination of the determination in question indicates that the itemized offsets are not expressly limited to payments and expenditures made after June 15, 1956. With regard to one item the contrary is indicated.<sup>24</sup>

In our view, designations made under the proviso of section 511 may properly include sums representing annual

<sup>22</sup> While the particular matter now under discussion is the county's tax claim against Moses Lake for 1958, the ruling just stated applies with like effect to the county's 1956, 1957, and 1958 tax claims against Larsonaire, and its 1957 and 1958 tax claims against Larson Heights. See footnote 19.

<sup>23</sup> In section 511 the date is used in this context:

"... Provided, That, no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed..."

<sup>24</sup> The second item under paragraph 2 of the determination reads: "Funds paid under P. L. 615 for years January 1953 to June 1956, inclusive, \$94,092.00 depreciated at 4%: \$3,763.68." The \$3,763.68 designated under this item thus represents the annual sum necessary to amortize over twenty-five years capital expenditures made between January 1953 and June 1956.

This Public Law citation is incomplete and erroneous. It should be "Public Law 815, 81st Cong., 2d Sess., 64 Stat. 967." This act relates to the construction of school facilities in areas affected by federal activities. It may also be noted that the citation "P. L. 874, 61st Cong." In the immediately preceding item of the designation is likewise erroneous. The reference intended was probably Public Law 874, 81st Cong., 2d Sess., 64 Stat. 1100, which relates to the providing of financial assistance for local educational agencies in areas affected by federal activities.



amortization of capital expenditures made prior to June 15, 1956. Such annual amortization sums, realistically considered, represent the amounts which the local government would have had to pay in the years subsequent to June 15, 1956, had the local government made these capital expenditures.

On the other hand, we do not believe that the proviso of section 511 authorizes the inclusion in the Secretary's designation of any part of noncapital expenditures made prior to June 15, 1956. Congress sought to prevent local taxing units from receiving windfalls after June 15, 1956. It would [fol. 361] receive a windfall after that date if credit could not be taken for the sums necessary to be paid annually in order to amortize capital expenditures made prior thereto. It would not receive a windfall after that date if credit could not be taken for noncapital expenditures made prior thereto, since local government does not normally amortize such expenditures over a period of years.

It is not possible to determine whether the Secretary's designation is so limited with regard to expenditures made prior to June 15, 1956. It was therefore error to use that determination in its present form as a basis for denying the county's tax claims.

The third objection which the county makes to the Secretary's designation of offsets is that such offsets were not designated with regard to specific tax years, but only for an unidentified and unsegregated number of years.

The parties have apparently assumed that the \$111,358.65 designation is intended to include all credits due at the time the determination was made on September 4, 1957. But examination of the designation quoted in footnote 20 indicates that with regard to six items the payments and expenses are attributed to a single year. These are the items referred to in footnote 24 and the five items listed under "Appropriate amounts for expenditures for services and facilities." Each of the latter items describes a capital outlay in a certain amount, but they designate approximately four per cent of such outlay as the offset, with the explanation "amortized 25 yrs. life." It would appear that the designation of these net items was intended to be reapplied



during each of the twenty-five years that the indicated capital outlays were being amortized.<sup>25</sup>

It is in any event true, as the county asserts, that the offsets were not designated with regard to specific tax years, but only for an unidentified and unsegregated number of years. If, therefore, section 511 requires that designated [fol. 362] offsets be related to specific tax years, it was error to use the designation as a basis for denying the county's 1958 tax claim against Moses Lake.<sup>26</sup>

The proviso to section 511, it will be noted, first recites that no taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee "shall exceed the amount of taxes or assessments on other similar property of similar value. . . ." Thus, a year-by-year comparison is required between the taxes or assessments actually levied or made with respect to the Wherry Act leasehold for a particular year and those which were levied or made on other similar property of similar value for the same year.

The proviso then goes on to state in effect that the tax or assessment levied or made for a particular year, as reduced to accord with taxes and assessments on other similar property of similar value, shall be further reduced by the designated offsets described in clauses (1) and (2). The implication is clear from this that clause (1) and (2) payments and expenditures which may be offset in arriving

<sup>25</sup> In the first sentence of the designation it is stated that "the lessee of which believes that the tax for 1956 will be equal to approximately \$65,000.00." It is difficult to account for this statement except upon the hypothesis that the designation was intended as an offset for 1956 taxes only. It is likewise difficult to account for the \$65,000 figure which appears in the statement. Larson Heights had no tax for 1956. The 1956 tax for Moses Lake was \$32,925, and for Moses Lake and Larsonaire together, \$54,675.

<sup>26</sup> It may be noted that the Secretary does not always omit an allocation as to tax years in making these designations. In the designation involved in *Air Base Housing, Inc. v. Spokane County*, No. 35261, now pending on appeal before the Washington Supreme Court, the designation was \$109,025.68 "for 1956" and \$113,018.45 "for 1957."

at the net collectible tax for a particular year are those which were made in that year. Thus, payments and expenditures made in 1957, including annual amortization sums chargeable to that year, may be offset only against taxes levied in 1957 and payable in 1958.

It is therefore our opinion that since the designation in question did not allocate the clause (1) and (2) payments and expenditures as between tax years, it was error to use such designation as a basis for denying the county's 1958 tax claim against Moses Lake.

The fourth and final objection which the county makes to the Secretary's designation of offsets is that it includes a number of items which are not contemplated by section 511. The items referred to are not contemplated by section 511, the county argues, because they assertedly relate to facilities or services of a kind which are not actually or customarily provided by the State of Washington, Grant [fol. 363] County, or other local taxing authorities with respect to other similar property.

The parties argue at great length the question of whether under clause (2) of section 511 the expenditures which may be offset against taxes must be limited in the way contended for by Grant County. We find it unnecessary to decide this question, however, since in our view the expenditures which were designated were for facilities and services of a kind furnished by the State of Washington and Grant County.<sup>27</sup>

The county has set out in its brief parallel lists of facilities and services for which expenditures were designated and which the state and county provide with respect to non-

<sup>27</sup> Since it is not necessary to decide this question, we are not called upon to consider the related contention of Moses Lake that the county may not in this action make a collateral attack upon the designation made by the Secretary. As we view it, the other deficiencies we have found in the designation with regard to inclusion of pre-June 15, 1956, payments and expenditures, and failure to segregate the offsets by tax years, do not manifest a collateral attack upon the designation but are arrived at only in considering the applicability of the designation to these taxpayers for the years in question.

Wherry Act property.<sup>28</sup> Not all of the items concerning [fol. 364] which designated clause (2) expenditures were indicated have identical counterparts in the nomenclature of the other list. But each item of designated expense is sufficiently identifiable with one or more items of the list of state and county services so that it may be fairly concluded that the limitation suggested by the county has been adhered to.

We hold that the designation of clause (2) offsets here in question is not to be disregarded on the ground that it includes items of a kind not contemplated by section 511.

This completes our review of the objections made by Grant County against applying the designated offsets against the county's claim made on the funds deposited for Moses Lake based on taxes payable in 1958. In summary, it would have been proper to partially or totally offset against the county's 1958 tax claim on the funds deposited for Moses Lake designated expenditures made in 1957, including annual amortization of capital expenditures. But since the designation contained no such year-by-year

<sup>28</sup> These lists are as follows:

The Secretary's determination of services provided by the United States:

- |                              |                    |
|------------------------------|--------------------|
| 1. Schools                   | 5. Sewer system    |
| 2. Streets, curbs, sidewalks | 6. Street lighting |
| 3. Street signs              | 7. Playground      |
| 4. Water system              |                    |

State and local taxes provide funds for

- |                          |                          |
|--------------------------|--------------------------|
| 1. Airport districts     | 10. Tuberculosis control |
| 2. Cemetery districts    | 11. Veterans' relief     |
| 3. Cities and towns      | 12. Ferry districts      |
| General government       | 13. Fire protection      |
| Accident fund            | 14. Parks                |
| Pension funds            | 15. Pest control         |
| Local Improvement guar-  | 16. Port districts       |
| anty funds               | 17. Public utilities     |
| Park funds               | 18. Schools              |
| 4. Horticultural matters | 19. Sewers               |
| 5. Hospitals             | 20. Water                |
| 6. Libraries             | 21. Diking and drainage  |
| County roads             | 22. Irrigation           |
| 8. Rodent control        | 23. Weed control         |
| 9. Flood control         |                          |

allocation, it was error to utilize it as a basis for disallowing this claim.

The county's claim against the funds deposited for Moses Lake based on taxes assertedly payable in 1959 was also denied, but not because of the Secretary's section 511 designation. It was denied because the leasehold passed into government ownership on March 1, 1958, pursuant to a declaration of taking. This was prior to the actual listing and assessment of the property for 1959 taxes, and hence prior to the time a lien could otherwise have attached to the property.

Since the county's claims are in rem, being directed against deposited funds, they cannot be sustained in the absence of a timely and valid lien. The trial court therefore correctly determined that the tax claim against Moses Lake for 1959 must be disallowed.

It follows from what is said above that the county's claim against the funds deposited for Moses Lake should have been allowed with regard to 1957 taxes as well as the 1955 and 1956 taxes, and was properly denied with regard to 1959 taxes. Concerning the claim based on Moses Lake [fol. 365] taxes payable in 1958, the record in its present form does not warrant the disallowance ordered by the court.

A cause is not ordinarily remanded for the purpose of giving a party an opportunity to supply a deficiency in his evidence. Here, however, the deficiency results from a misunderstanding, apparently shared by the trial court, as to the meaning of section 511, and from the fact that Moses Lake had to rely on a defective Secretary's designation for which the company was not responsible. Under these circumstances we believe that a remand is in order to afford a reasonable opportunity to make the showing contemplated by section 511.

We turn our attention now to the tax claims against Larsonaire for 1956, 1957, and 1958, and against Larson Heights for 1957 and 1958.

Concerning the 1956 and 1957 taxes of Larsonaire and the 1957 taxes of Larson Heights, these respective properties could have been, but were not, listed and assessed prior to June 15, 1956. The assessor did not do so because

he apparently assumed, not without warrant,<sup>29</sup> that in view of the Moses Lake injunction similar injunctions would have been obtained by Larsonaire and Larson Heights if he had attempted to take such action. Thus, no inchoate lien arose prior to June 15, 1956, with regard to Larsonaire's 1956 and 1957 taxes or Larson Heights' 1957 taxes.

But county officials were not actually restrained by these two condemnees prior to June 15, 1956, from performing their statutory duty to list and value the Larsonaire and Larson Heights leaseholds. Larsonaire and Larson Heights, therefore, are not chargeable with the assessor's failure to act prior to that date. It follows that with respect to the tax years now being discussed, no encumbrance having attached prior to June 15, 1956, the limitations upon the collection of taxes prescribed by section 511 must be given [fol. 366] full application. There has never been any question but that the 1958 taxes levied against Larsonaire and Larson Heights are subject to section 511.

Everything said above concerning the effect of section 511 and the designation made thereunder upon the 1958 tax claim against Moses Lake applies with equal force to the 1956, 1957, and 1958 tax claims against Larsonaire and the 1957 and 1958 tax claims against Larson Heights. What has been said with regard to the county's claim against the funds deposited for Moses Lake based on taxes assertedly payable in 1959 is also applicable with regard to the county's 1959 tax claims against the funds deposited for Larsonaire and Larson Heights.

But one more contention remains to be discussed. At an early point in this opinion we dealt with the argument of Moses Lake that the personal property tax levies against that company were invalid under state law because the assessor did not list the property as a leasehold. We re-

<sup>29</sup> On January 3, 1957, following the decision in *Offutt Housing Company v. County of Sarpy*, supra, the property of Larsonaire was assessed as "omitted property" for 1956 and 1957 taxes. At the same time the property of Larson Heights was similarly assessed for 1957 taxes. These two companies then obtained state court orders temporarily enjoining further tax proceedings until the remittitur should be handed down in the Moses Lake case then pending before the state supreme court for the second time.



jected the argument on the ground that the doctrine of res judicata precluded Moses Lake from raising that issue in this action.

This doctrine, however, does not preclude Larsonaire and Larson Heights from raising the same issue, since they were not parties to the state court action in which Moses Lake could have obtained an adjudication of the question. These two condemnees did not appeal from that part of the judgment herein which denied the tax claims asserted against them. They could not have appealed because they are not aggrieved by that judgment. They are nevertheless entitled to assert here in defense of that judgment a ground which would support it, even though it was a ground which the trial court rejected. We will assume that they have done so in view of the fact that they joined in the brief in which Moses Lake advanced this argument.

As stated above in discussing the similar contention of Moses Lake, the assessor in listing and assessing these properties used the form prescribed by the tax commission pursuant to RCW 84.40.050. He did not, however, list the properties under item 28 entitled "Leaseholds," but did so under item 27 entitled "Improvements upon land the fee of which is vested in the United States, the state, or any political subdivision thereof."

[fol. 367] RCW 84.40.050 authorizing the tax commission to prescribe such forms was enacted in 1925.<sup>30</sup> Prior to this enactment the forms to be used in listing and assessing property were prescribed by statute. Rem. Comp. Stat., § 11137 (Laws Ex. Sess. 1925, chapter 130, § 54). Under that statute the assessor was required to list and value personal property under some thirty different classes as its character and situation might vary. While that statute was in effect a case arose in the courts of Washington in which the owner of certain property contended that the personal property tax was invalidly levied because the property fell within three classes specified in the statute, whereas it was listed and valued as if in reality it fell only within one class. *Southwark Foundry & Machine Co. v. Barham*, 126 Wash. 204, 217 Pac. 1021.

<sup>30</sup> Laws Ex. Sess. 1925, chapter 130, § 23.



Rejecting this contention, the Washington Supreme Court said in that case:

"But we cannot conclude that this renders the assessment void. The statute is largely directory, and a substantial compliance therewith is sufficient to satisfy its directions. It is the policy of the law, so declared in the act itself, that all property subject to taxation shall be listed and assessed and it is of more importance that this part of the act be complied with than it is that it be listed under the specific designation the legislative form prescribes. Moreover, the appellant was in no manner injured by the error. If in the end it is required to pay a tax upon the property it claims, the tax will be no more nor no less than it would have been required to pay had the listing and valuation been made in the manner in which it contends it should have been made."

It seems to us that since the Washington Supreme Court regarded the prior statute which prescribed the form of such lists as directory only it would so regard the form of lists prescribed by the tax commission under the later enacted RCW 84.40.050. The rationale of the Southwark decision therefore leads us to hold that the listing of the Larsonaire and Larson Heights properties under an item not specifically labeled "leaseholds" did not invalidate the levying [fol. 368] of taxes upon their Wherry Act project leaseholds for the years in question.

The county's claim against funds deposited for Larsonaire and Larson Heights based on 1959 taxes was properly denied. Concerning the county's claim against the funds deposited for Larsonaire based on 1956 through 1958 taxes and against the funds deposited for Larson Heights based on 1957 and 1958 taxes, the record in its present form does not warrant the disallowance ordered by the court. For the reasons indicated in discussing the disallowance of the claim against Moses Lake for 1958 taxes, we believe that a remand for further proceedings concerning these claims is appropriate.

The judgment is affirmed in part and reversed in part, as indicated herein. The cause is remanded to the trial court for further proceedings and the entry of a new judg-

ment. In such judgment the claim of Grant County against the estimated compensation deposited for Moses Lake Homes, Inc., based on taxes levied against the leasehold payable in 1955, 1956, and 1957, shall be allowed in full. The claims of Grant County against the estimated compensation deposited for Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., based on taxes assertedly levied against the respective leaseholds of these companies payable in 1959, shall be disallowed in full.

Further proceedings shall be had in the trial court on the claim of Grant County against estimated compensation deposited for Moses Lake Homes, Inc., based on taxes levied against that company payable in 1958; against estimated compensation deposited for Larsonaire Homes, Inc., based on taxes levied against that company payable in 1956, 1957, and 1958; and against estimated compensation deposited for Larson Heights, Inc., based on taxes levied against that company payable in 1957 and 1958.

In such further proceedings the respective taxpayers shall be given a reasonable opportunity (1) to offer evidence showing the extent to which the tax levied for each such year exceeds the tax payable in that year which Grant County levied, or would have levied, on other similar property of similar value; and (2) to obtain and offer in evidence a revised designation of offsets made pursuant to section 511, in which offsetting payments and expenditures made [fol. 369] in each year in which the taxes payable in 1956, 1957, and 1958 were levied, including sums reasonably attributable to annual amortization of capital expenditures, are separately stated. With respect to evidence, if any, submitted under (1) above, Grant County may produce counter evidence. The validity of any revised designation may be challenged on any ground not adjudicated on this appeal, subject to the question of whether such challenge is an impermissible collateral attack upon an administrative determination.

All of such evidence, if any, shall then be taken into account by the trial court in determining whether under section 511 it is necessary to partially or wholly disallow the claims of Grant County to which reference is now being made. In the event no substantial evidence is offered by the named taxpayers with respect to any individual year in

which such tax was levied, the full amount of the tax subsequently payable on the basis of such levy shall be allowed.

The parties shall bear their respective costs on this appeal and cross-appeal.

[File endorsement omitted]

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[fol. 370]

IN UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
No. 16234

---

MOSES LAKE HOMES, INC., Appellant,

vs.

GRANT COUNTY, Appellee & Cross Appellant,  
LARSONAIRE HOMES, INC., LARSON HEIGHTS, INC., and  
MOSES LAKE HOMES, INC., Cross-Appellees.

---

JUDGMENT—Filed and Entered January 25, 1960

Appeals from the United States District Court for the Eastern District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed in part and affirmed in part, and that this cause be, and hereby is remanded to the said District Court for further proceedings and the entry of a new judgment in accordance with the views expressed in the opinion of this Court, the parties to bear their respective costs on appeal and cross-appeal.

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING  
—May 17, 1960

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellant Moses Lake Homes, Inc., filed February 24, 1960, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

[fol. 372] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 373]

SUPREME COURT OF THE UNITED STATES  
No. 212—October Term, 1960

MOSES LAKE HOMES, INC., ET AL., Petitioners,

VS.

GRANT COUNTY

ORDER ALLOWING CERTIORARI—October 10, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted limited to Question No. 3 presented by the petition which reads as follows:

"3. May a state tax which discriminates against persons holding leaseholds from the United States be enforced in a United States court against a deposit of estimated compensation in a condemnation of such leaseholds?"

The case is transferred to the summary calendar. The Solicitor General is invited to file a brief in this case setting forth the views of the United States.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

No. 212

Office-Supreme Court U.S.

FILED

JUL 5 1960

JAMES R. BROWNING, Clerk

IN THE  
**Supreme Court of the United States**

\_\_\_\_\_  
October Term, 1959  
\_\_\_\_\_

**MOSES LAKE HOMES, INC., LARSONAIRE HOMES,  
INC. and LARSON HEIGHTS, INC.,**

*Petitioners,*

v.

**GRANT COUNTY,**

*Respondent.*

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI**  
\_\_\_\_\_

**LYCETTE, DIAMOND & SYLVESTER and  
LYLE L. IVERSON**

*Attorneys for Petitioners*

Office and Post Office Address:

400 Hoge Building

Seattle 4, Washington.



IN THE  
**Supreme Court of the United States**

\_\_\_\_\_  
**October Term, 1959**  
\_\_\_\_\_

No. ....

**MOSES LAKE HOMES, INC., LARSONAIRE HOMES,  
INC. and LARSON HEIGHTS, INC.,**  
*Petitioners,*

v.

**GRANT COUNTY,**  
*Respondent.*

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI**  
\_\_\_\_\_

**LYCETTE, DIAMOND & SYLVESTER and  
LYLE L. IVERSON**  
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**Seattle 4, Washington**

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**IN THE  
Supreme Court of the United States**

**October Term, 1959**

No. ....

**MOSES LAKE HOMES, INC., LARSONAIRE HOMES,  
INC. and LARSON HEIGHTS, INC.,**  
*Petitioners,*

**v.**

**GRANT COUNTY,**

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**PETITION FOR WRIT OF CERTIORARI**

Petitioners pray for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

**OPINIONS BELOW**

The memorandum opinion of the trial court (Tr. 266) is not contained in official reports. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 1 to 40) is reported in 276 F.(2d) 836.

**JURISDICTION**

The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254 (1). The opinion of the court below was filed January 25, 1960, and order



denying petition for rehearing was entered May 17, 1960 (Tr. 371). This petition is filed within ninety (90) days following said date.

### QUESTIONS PRESENTED

(1) Does a United States statute prescribing the manner of taxing certain Federal leaseholds not encumbered by a tax prior to June 15, 1956 apply to taxes retroactively levied subsequent to said date?

(2) Where a state tax was attempted to be levied against a leasehold of property from the Federal Government in total disregard of a Federal statute prescribing the conditions for such taxation, may the court enforce a portion of such state taxes against a deposit of estimated compensation in a condemnation of such leasehold?

(3) May a state tax which discriminates against persons holding leaseholds from the United States be enforced in a United States court against a deposit of estimated compensation in a condemnation of such leasehold?

### STATUTES INVOLVED

Statutes pertinent to the consideration of this application are: Section 511 of The Housing Act of 1956, 69 Stat. 653, Title 42, United States Code, annotated Section 1594, Note, which is set out in Appendix B hereto; Section 84.40.030 of the Revised Code of Washington, particularly

the last paragraph thereof, which Statute is set out in Appendix C hereto; Section 84.40.080. of the Revised Code of Washington which is set out in Appendix D hereto; Section 84.60.030 of the Revised Code of Washington set out in Appendix E hereto.

### STATEMENT OF THE CASE

Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., respectively, were sponsors of Wherry Act housing projects on Larson Air Force Base in the State of Washington, pursuant to leases made to them by the Secretary of the Air Force under the Wherry Act, Title VIII of the National Housing Act, Title 5 USC 626 S-3 and Title 12 USC 1748 to 1748(h) (Tr. 99, 103, 140). The United States commenced condemnation proceedings to acquire the leasehold interests of the three corporations (Tr. 3) and a declaration of taking was entered on March 1, 1958 (Tr. 18).

At that time the United States paid into the Registry of the Court estimated compensation to the three corporations in the aggregate amount of \$253,000.00 (Tr. 26). Grant County, Washington, filed with the court an Assessment Lien and Statement (Tr. 72) and subsequently filed with the court a petition for order directing payment of money to it (Tr. 83), wherein it claimed to have certain lien rights for personal property taxes against the property for the years 1955 through 1959 and petitioned the

court to have the estimated compensation on deposit paid to it on the basis of its claimed lien (Tr. 83). The three corporations also petitioned for the payment of the estimated compensation to them (Tr. 181).

The court tried the issue so made up, following which it entered its Findings of Fact and Conclusions of Law (Tr. 151) and a Judgment (Tr. 160), whereby claims of Grant County against the estimated compensation were denied except as to its claim against Moses Lake Homes, Inc., which was allowed for 1955 taxes and for 1956 taxes.

Appeal and cross-appeal were taken pursuant to Rule 54b of the Rules of Civil Procedure to the Ninth Circuit Court of Appeals by the respective parties, which reversed in part and affirmed in part the judgment of the lower court and remanded the cause to the District Court for further proceedings (Tr. 370). It is that judgment which we seek to have reviewed.

The three corporations held leases from the Government under which they were to erect, maintain and operate on a military reservation a housing project for a period of seventy-five years unless sooner terminated by the Government (Tr. 104). The project was to be financed by an FHA insured loan (Tr. 106) and the housing units were to be leased to military and civilian

personnel assigned by the military Commander (Tr. 107). The lease, in Paragraph 11 (Tr. 103), provided that buildings as soon as erected were to become the property of the Federal Government (Tr. 113).

The Assessor of Grant County in June, 1954 listed the physical improvements placed upon the military reservation by one of the corporations, Moses Lake Homes, Inc., upon his "Detail and Assessment List" for 1955 taxes (Tr. 152). Thereafter, in July of 1954 Grant County was restrained by the Superior Court of the State of Washington from levying or attempting to levy taxes against the property of Moses Lake Homes, Inc., and the restraining order remained in effect until December, 1957 when the Supreme Court of the State of Washington, in *Moses Lake Homes, Inc. v. Grant County*, 51 Wn.(2d) 285, 317 P.(2d) 1069, set the injunction aside and held that plaintiff Moses Lake Homes, Inc.'s leasehold was taxable at the valuation of the physical improvements (Tr. 154).

During the time that the injunction was outstanding the officials of Grant County took no action to list or assess the property of Larsonaire Homes, Inc. or Larson Heights, Inc., although they were not restrained from doing so. Also, no further assessment of the property of Moses Lake Homes, Inc. was attempted during that period, but after the Moses Lake Homes, Inc. injunction was lifted in 1957 the County taxing officials for the first

time listed on the tax rolls the property of Larsonaire Homes, Inc. and Larson Heights, Inc. for any years, and listed for the first time the property of Moses Lake Homes, Inc. for years subsequent to 1955. This listing was accomplished pursuant to the Washington omitted property statute, Section 84.40.080, Revised Code of Washington, (Appendix D hereto) which provides in its essential parts:

"The Assessor . . . shall enter in the detail and assessment list of the current year any property shown to have been omitted from the assessment list of any preceding year at the valuation of that year, or if not then valued, at such valuation as the assessor shall determine from the preceding year. . . . When such an omitted assessment is made, the taxes levied thereon may be paid within one year of the due date for the taxes for the year in which the assessment is made without penalty or interest."

Prior to 1957 no actual levy whereby the amount of the taxes was ascertained had been made (Tr. 153). All of the taxes thus became payable for the first time in 1957.

Congress, by Section 511 of the Housing Act of 1958 (Appendix B *infra*) prescribed that taxes might be levied against the interests of Wherry Act leaseholders,

" . . . Provided, That no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to . . . ,"

certain payments made by the Federal Government or the lessee.

Both the trial court and the Circuit Court of Appeals herein have found that these Wherry Act lessees were taxed upon their leaseholds upon a *different and higher basis* than taxes are assessed against other similar property of similar value (Tr. 155, Tr. 355).

By a Washington statute, Section 84.40.030 of the Revised Code of Washington (Appendix C *infra*) it is provided:

"Taxable leasehold estates shall be valued at such price as they would bring at a fair, voluntary sale for cash."

The Washington Supreme Court has applied this statute to all Wherry Act leaseholds and has held with respect to leaseholds held from the State of Washington, and with respect to all leaseholds other than Federal Wherry Act housing project leaseholds, that in valuing the leaseholds for taxation purposes they must be measured by their *market value* considered in the light of their burdens and benefits. *Metropolitan Building Co. v. King County*, 72 Wash. 47, 129 Pac. 887; *Metropolitan Building Co. v. King County*, 62 Wash. 409, 113 Pac. 1114; *In re Metropolitan Building Co.*, 144 Wash. 469, 258 Pac. 473 (Tr. 155).

The State of Washington has followed a different



method of evaluating Wherry Act housing projects for taxation purposes by the decision of its Supreme Court in the case of *Moses Lake Homes, Inc. v. Grant County*, 51 Wn.(2d) 285, 317 P.(2d) 1069, whereby the Supreme Court of Washington held that with respect to Wherry housing project leases, the value of the leasehold interest is the full value of the buildings and the improvements (Tr. 155). The Circuit Court of Appeals (Tr. 355) held the finding of the trial court (Tr. 155) to be correct where the trial court stated:

"By the laws of the State of Washington, as declared by its Supreme Court, taxes and assessments on Wherry housing projects are thus levied upon a basis different and higher than the amount of taxes and assessments on other similar property of similar value."

The Circuit Court said (Tr. 355):

"The trial court's further finding that a different method was used in valuing the Wherry Act project leaseholds here in question is also correct. Likewise to be sustained is the court's finding that the method used in assessing the Moses Lake leaseholds resulted in a higher tax than would have been true in the case of a non-Wherry Act leasehold."

The Circuit Court, however, proceeded to hold that the failure to tax upon the same basis as other similar property is taxed did not invalidate the tax, but only required that the amount collectible be reduced to what it would have been had the tax been levied upon a non-

Wherry Act leasehold basis (Tr. 355). The court there said:

"Under Section 511, however, the fact that the taxes are higher does not invalidate the entire tax. It only requires that the amount collectible be reduced to what it would have been had the tax been levied on a non-Wherry Act leasehold basis."

The court held that those taxes on Moses Lake Homes, Inc. which, except for the injunction, would have been assessed and levied prior to June 15, 1956 (the date mentioned in Section 511 of the Housing Act of 1956 [Appendix B *infra*]) were collectible in full (Tr. 353, 354).

The Secretary of the Air Force, through his authorized representative, under date of 4 September 1957 made a determination of the credits to be allowed against the taxes, pursuant to Section 511 of the Housing Act of 1956 (Appendix B *infra*) which determination appears in Transcript 125.

Grant County in attempting the taxation did not take into account that determination (See Request for Admission 12, Tr. 102, and answer thereto, Tr. 141). The Assessor of Grant County, in fixing the assessed values of the properties, based his valuation upon fifty percent (50%) of the market value of the physical improvements on the respective property held by respective plaintiffs, without reference to the market value of the leaseholds of the respective plaintiffs and without reference to mort-

gages and encumbrances against leaseholds (Tr. 102, 141). The leaseholds were heavily encumbered by mortgages (Tr. 355, footnote).

The statutes of Washington make no provision for allowing any credits against taxes as contemplated by Section 511 of the Housing Act of 1956.

The Circuit Court has ordered the cause remanded to the District Court to enter judgment against Moses Lake Homes, Inc. for 1955, 1956 and 1957 taxes and for further proceedings to determine the amount of other taxes to become due, based upon assessments on the same basis as other similar property is assessed, and after allowing proper credits for the amounts to be redetermined by the Secretary of the Air Force, pursuant to Section 511 of the Housing Act of 1956 (Tr. 26).

### SUMMARY OF ARGUMENT

This is a matter of first impression involving the application and interpretation of Section 511 of the Housing Act of 1956. The decision of the Circuit Court of Appeals, in declining to apply that statute to taxes becoming liens retroactively after its effective date, is contrary to both the letter of the statute itself and applicable State laws with respect to the time when a lien of taxes becomes fixed. The decision presents a substantial question of Federal law not heretofore decided by this court as to the effect

upon the applicability of a Federal statute of the retro-active creation by a State of a tax lien.

The decision of the Circuit Court wherein it undertakes to enforce a State tax which is found to be discriminatory against the holder of a Federal leasehold is contrary to the applicable decisions of this court, particularly *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376, 4 L.Ed.(2d) 579.

The Circuit Court in finding that the conditions prescribed by Congress for the imposition of taxes upon Federal leaseholds had been totally disregarded should have confined its action to holding the taxes invalid, and was without authority to enforce a portion of the tax claims in a manner not sanctioned by State laws under which they were levied.

## REASONS FOR GRANTING THE WRIT

### 1. *The Court Failed to Apply the Federal Statute.*

This case raises questions that need to be settled with respect to State taxation of the leaseholds given by the Department of Defense on its military reservations pursuant to Title VIII of the National Housing Act, 12 USC, Section 1748 *et seq.* Following a decision of this Court with respect to the taxability by States of such leaseholds in the case of *Moffett Housing Co. v. Sarpy County*, 351 U.S. 253, 100 L.Ed. 1151, Congress, with the express

intent of modifying the effect of that decision (See House Report, No. 2363, 84th Cong. 2nd Session, accompanying H.R. 11742, 3 U.S. Code Congressional and Administrative News, 84th Cong. 2nd Sess., p. 4509 at 4555-4556) enacted Section 511 of the Housing Act of 1956 (Appendix B *infra*). This statute in its proviso placed certain limitations upon state taxes against such leaseholds.

"... not paid or encumbering such property or interest prior to June 15, 1956."

These restrictions are twofold:

(1) No such taxes shall exceed the amount of taxes or assessments on other similar property of similar value, and (2) the taxes shall be reduced by such amount as the Secretary of Defense or his designee determines to equal (a) "... any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other services or facilities which are customarily provided by the State, county, city or other local taxing authority with respect to such other similar property ..."

There is no contention in this case that any consideration whatsoever was given to this statute by the State authorities in any of their procedures to lay the taxes in question. No State statute recognizes the requirements of Section 511, *supra*, and procedures are rigidly fixed by

State law (Chap. 84.40 and Chap. 84.52, Revised Code of Washington).

In two respects the taxes in this case failed to meet the requirements prescribed by Congress for permissible taxation of a Wherry Act leasehold: (1) The taxes did exceed the amount of taxes on other similar property of similar value (Tr. 355), and (2) they were levied without any attempt at compliance with Section 511, *supra* (Tr. 102, Tr. 141). The Circuit Court of Appeals, although accepting these facts, declined to apply Section 511 to those taxes with respect to which levies should have been, but were not, made prior to the effective date of Section 511, namely June 16, 1956 (Tr. 352). The court reasoned that because the levy was prevented by an injunction that the application of the Federal statute was thereby prevented (Tr. 352). The fallacy of this result is that it disregards the express language of the Act of Congress, Sec. 511 of the Housing Act of 1956, as well as the law of the State of Washington with respect to the manner in which taxes become an encumbrance upon property as declared by the highest court of the State.

The Supreme Court of the State of Washington has unmistakably declared that notwithstanding a provision of statute whereby taxes are declared to be a lien from the first day of the year in which assessed, that *no lien* is created until the taxes *have been levied*. The levy did not



occur in this case until long after the effective date of Section 511 of the Housing Act of 1956. Thus, these taxes did not encumber the property on that date.

The Supreme Court of the State of Washington, in the case of *Puget Sound Power & Light Co. v. Cowlitz County*, 38 Wn.(2d) 907, 234 P.(2d) 507, said:

"The fact that the lien of the tax so created is by relation attached to specific property as of the date of the initiation of the process on March 1st, cannot do away with the necessity of pursuing the whole statutory proceeding before any tax is created so as to attach as a lien as of that, or any, date. While the State has power for the purposes of the lien to treat the entire proceedings as having been taken at any given time, the fact does not do away with the necessity of any step in the proceedings. It seems self-evident that there can be no valid or effective lien for a tax until there is a valid tax in some specific amount." (Emphasis supplied)

No valid tax in any specific amount was ever levied and no lien existed under the declaration of the highest Court of the State of Washington as of June 15, 1956. Thus, the exception stated in Section 511 of the Housing Act of 1956 as to taxes encumbering the property on its effective date did not exist.

Cases relating to the tolling of a statute of limitations by the existence of an injunction have no application to a situation involving the application of a Federal statute. The Circuit Court of Appeals sought to draw analogy to

other situations dealing with *notice* to encumberancers of inchoate taxes, *U. S. v. Alabama*, 313 U.S. 274, 85 L.Ed. 1327 (Tr. 352), and to the situations in other States, namely California and New Hampshire, where the tax lien is held to *originate with the assessment*, *U. S. v. Sampsell*, 153 F.(2d) 731, *Allen v. Bemis* (N.H.) 108 A.(2d) 549, but those cases do not deal with the question of when a Federal statute becomes applicable to a tax, nor is the creation of a tax lien in those jurisdictions postponed until a levy is made, as in Washington.

The reason for any principle of law must be the guide to its interpretation. Congress, in enacting Section 511, obviously, did not intend to undo property rights which had become permanently fixed. Thus, it wrote in the exception of taxes which had been paid prior to June 15, 1956, and those which *encumbered* the property prior to June 15, 1956. This was because *property rights had become fixed* with respect to taxes that had been paid and liens that actually encumbered the property. But in this case, if we accept the decision of the highest court of the State of Washington, the lien was *not fixed* until the levy was made in 1957, and *at the time the levy was made* Section 511 was *fully in force*, the State authorities were charged with notice of it and were fully able to make it effective.

The decision of the State of Washington to the effect

that taxes do not become a lien until levied in a specific amount is not one of recent origin, but in the case of *Puget Sound Power & Light Co. v. Cowlitz County*, 38 Wn.(2d) 907, 234 P.(2d) 507, *supra*, the court merely affirmed a long-standing principle of Washington law, first enunciated in *State v. Snohomish County*, 71 Wash. 320, 128 Pac. 667, where the Washington court had held that there is no lien on the property until the time of the levy. It is because of the fact that there is no such lien that the Washington court has held more than once that property passing into public ownership between the date of assessment and the date of levy is not subject to the tax. (See the two cases last cited.)

Equitable principles about tolling the statute of limitations have no application to determining when a Federal statute shall come into play. The fact that an injunction had been the cause of a levy not having been made prior to the effective date of the Federal law simply has nothing to do with the question of whether State authorities can, after the Federal law is effective, levy a tax for the first time creating a lien to encumber the property and in so doing disregard the Federal law.

All of the taxes involved in this case, except those against Moses Lake Homes, Inc., assessed in 1954 for collection in 1955, had their origin by the listing in 1957 of the property for the first time under the "omitted prop-

erty" section of the Washington statutes (Section 84.40.080 of the Revised Code of Washington, Appendix D *infra*). By the terms of this statute, they were entered on the assessment list for 1957, the year after the effective date of Section 511 of the Housing Act of 1956, and *both the inception and the completion of these levies occurred after that law was fully effective* (Tr. 353).

Under the decisions of the Washington court even the unlevied 1955 taxes never become liens until after the effective date.

A Federal statute does not depend for its effectiveness upon any equities as to what facts caused a particular status to exist as of the effective date of the Federal statute. A statute represents the policy of Congress with respect to this taxation and the action of individuals who postponed the accomplishment of a certain property status before the Federal law became effective does not prevent the policy of Congress from applying to that state of facts.

In this case the state of facts was that *none of the taxes in question encumbered the property on June 15, 1956*, and it was error for the Court of Appeals to interpret the language of Congress to mean other than what it said, to disregard the statute, and to lend its assistance to enforcement of taxes levied in disregard of the act of Congress which was fully effective before those taxes became liens or encumbrances.

## 2. *The Taxes Discriminate Against Federal Lessees.*

Another reason why this court should entertain jurisdiction of this cause is because the Circuit Court of Appeals has decided contrary to the well-settled declarations of this court to the effect that State taxation of those dealing with the Federal Government must be nondiscriminatory. In the present case, the Circuit Court has clearly found that the taxes in question, both before and after the effective date of Section 511, were discriminatory against lessees from the Federal Government. The court said (Tr. 355):

"The trial court's further finding that a different method was used to evaluate the Wherry Act project leaseholds here in question is also correct. Likewise to be sustained is the court's finding that the method used in assessing the Moses Lake leaseholds resulted in a higher tax than would have been true in the case of a non-Wherry Act leasehold."

The law of the State of Washington is well settled in a long series of cases involving leases from the State of Washington to the effect that such leaseholds from the State must be measured by the *market value* of the leasehold considered in the light of *its burdens and benefits*. Some of the State cases so holding are: *In re Metropolitan Building Co.*, 144 Wash. 469, 258 Pac. 473; *Metropolitan Building Co. v. King County*, 72 Wash. 47, 129 Pac. 883; *Metropolitan Building Co. v. King County*, 62 Wash. 409, 113 Pac. 1114. The Circuit Court correctly found that

these cases express the law of the State of Washington with respect to all leaseholds, other than Wherry Act leaseholds from the Government, and particularly they express the law of Washington with regard to leases from the State of Washington. The Washington Supreme Court, however, as the Circuit Court also found, has held that in the taxing of Wherry Act project leaseholds the tax is to be measured by the *full value of the buildings and improvements* (Tr. 354).

The Washington court, thus, in the case of Wherry Act leaseholds alone, totally disregards the *market value* of the leaseholds and totally disregards the *encumbrances against them*.

Even without the restriction against discriminatory taxation in Section 511 of the Housing Act of 1956, it was illegal for the State to discriminate against the holder of a Federal leasehold. This court, as far back as *McCulloch v. Maryland*, 4 Wheat: 316, 4 L.Ed. 579; adopted the principle that a State may not constitutionally levy taxes on those dealing with the Federal government except on a non-discriminatory basis.

In *McCulloch v. Maryland*, *supra*, this court said, on page 609 of Law Edition:

"The opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the



bank in common with the other real property within the State, nor to a tax imposed on the interests which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the State."

Throughout the years this court has reiterated the proposition that taxation by States of those who deal with the Federal government must be nondiscriminatory. For example see *Miller v. Milwaukee*, 272 U. S. 713, 47 Sup. Ct. 280, 71 L.Ed. 487; *Graves v. New York ex rel O'Keefe*, 306 U.S. 466, 59 Sup. Ct. 595, 83 L.Ed. 927; *Alabama v. King and Boozer*, 314 U. S. 1, 62 Sup. Ct. 43, 86 L.Ed. 3; *Smith v. Davis*, 323 U. S. 11, 65 Sup. Ct. 157, 89 L.Ed. 107; *James v. Dravo Contracting Company*, 302 U. S. 134, 58 Sup. Ct. 208, 82 L.Ed. 155; *Buckstaff Bathhouse Company v. McKinley*, 308 U. S. 358, 60 Sup. Ct. 279, 84 L.Ed. 322; *Oklahoma Tax Commission v. Texas Company*, 336 U. S. 342, 69 Sup. Ct. 561, 93 L.Ed. 721; *Helvering v. Gerhardt*, 304 U. S. 405, 58 Sup. Ct. 969, 82 L.Ed. 1427.

Most recently and most directly this court has, in the case of *Phillips Chemical Co. v. Dumas Independent School District*, 361 U. S. 376, 4 L.Ed.(2d) 579, directly held that a State tax is *invalid* where it undertakes to levy a tax against a lessee from the Federal Government on a basis under which it discriminates against the lessee in a manner that it would not do if the lease were held from the State. The court there said:

"As we had occasion to state quite recently, it still remains true as it has from the time of *McCulloch v. Maryland*, 4 Wheat. 316, that a state tax may not discriminate against the Government or those with whom it deals. See *U. S. v. City of Detroit*, *supra*, 473. Therefore, this tax may not be exacted."

The decision in that very recent case is applicable to all the taxes involved in this case, whether they originated before or after the effective date of Section 511 of the Housing Act of 1956, for the reason that, even without a declaration of Congress to that effect, a State is constitutionally prohibited from discriminating against those who deal with the Federal government, and that is exactly what the State of Washington has done in this case.

There is no question in this case about the fact. Both the District Court and the Circuit Court of Appeals have found the fact to be that discrimination exists.

There is no dissent from the proposition that a State in taxing the property of an individual may not pick him out for special adverse treatment because his property is put to a Federal use. That is exactly what the effect of the Washington law is where it taxes Wherry Act leaseholds alone, of all leaseholds in the State, on a different and higher basis.

It is important that this court take jurisdiction of this matter because the decision of the Circuit Court has dis-

regarded this fundamental proposition of Constitutional law.

The error in failing to take into consideration the Constitutional principle is a rather fundamental one, and the rule is well established that matters which are fundamental may be considered by an appellate court in the interest of justice at any time. *Kansas City So. R.R. Co. v. Guardian Trust Co.*, 240 U. S. 166, 60 L.Ed. 579. The court in this case committed legal error in disregarding the principle that a state tax may not be enforced if it discriminates against a Federal lessee, and it is open to this court to consider that legal error, *Weems v. U. S.*, 217 U. S. 349, 54 L.Ed. 793; *Kryger v. Wilson*, 242 U. S. 171, 61 L.Ed. 229; *Clyatt v. U. S.*, 197 U. S. 207, 49 L.Ed. 727; *Wilborg v. U. S.*, 163 U. S. 692.

This question of law affects the public interest, in that the tax represents a policy of discrimination against those contracting with the Federal government, which must of necessity reflect adversely upon the attractiveness of this kind of activity of the Federal government to private capital, and, in fact, since the added costs may be passed back to the Federal government or its soldiers and airmen, such discrimination actually burdens the Federal government. Because the public interest is involved, this is the type of matter in which this court should take jurisdiction.

These matters are not barred by *res judicata* since there has been no decision of the Washington Supreme Court passing upon the effect of the discrimination.

In the case of *Moses Lake Homes, Inc. v. Grant County*, 51 Wn.(2d) 285, 317 P.(2d) 1069, which the Circuit Court of Appeals pointed to as determining the matter with respect to the 1955 and 1956 taxes on Moses Lake Homes, Inc., the court did not discuss or purport to decide upon any question as to whether the County could levy a discriminatory tax against a Federal lessee. The decision is *res judicata* only as to what it held, and what it held is simply that under the law of the State of Washington the sponsor of a Wherry Act housing project alone, of all the lessees in the State, shall be taxed on his leasehold at the full value of the physical improvements and not on the market value of the leasehold, considered with its burden and benefits.

That matter was not appealable to this court under Section 1257 of Title 28 of the United States Code, and since the Supreme Court of Washington did not discuss or decide upon the question of discrimination against a Federal lessee it is not a matter which this court would have reviewed upon a Writ of Certiorari to that court. One of the cardinal principles of this court for reviewing a state court's decision is that only Federal questions discussed in the state court's decision will be reviewed by

this court. Thus, in *Northwestern Bell Tel. Co. v. Nebraska State Railway Comm.*, 297 U. S. 471, 80 L.Ed. 810, this court refused to pass upon contentions made as to disregard by a state court of Federal rights, saying:

"This opinion discusses only the first two contentions made here. We accordingly confine our review to them."

To the same effect is *Cox v. Texas*, 202 U. S. 446, 50 L.Ed. 1099. This court has consistently held that it will not review state court's decisions as to questions not passed upon by the state court in its decision. *State Farm Mut. Ins. Co. v. Duel*, 324 U. S. 154, 89 L.Ed. 812. The Federal question must not only have been raised in the state court, but must have been decided in the state court, *Mathison v. Branch Bank of the St. of Alabama*, 48 U. S. 260, 12 L.Ed. 692; *Wilson v. Cook*, 327 U. S. 474, 90 L.Ed. 793; *Mellon v. O'Neil*, 275 U. S. 212, 72 L.Ed. 245; *Seaboard Airline Railway v. Duvall*, 225 U. S. 477, 56 L.Ed. 1171; *Appleby v. Buffalo*, 221 U. S. 524, 55 L.Ed. 838; *Mathews v. Juwe*, 269 U. S. 262, 70 L.Ed. 266.

In the present case, nothing appears in the decision of the Supreme Court of Washington in the case of *Moses Lake Homes, Inc. v. Grant County*, *supra*, to show that any Federal question was ever considered or passed upon. Thus, for the first time the Federal question can be brought to this court because the Circuit Court of Appeals is undertaking to *lend its power to enforce discriminatory*

state taxation in contravention of the decisions of this court.

### 3. *The Decision Would Enforce Void Taxes.*

Still another reason why this court should grant certiorari is that the Circuit Court of Appeals exceeded its permissible authority in this case in determining to remand the matter to the District Court to determine the amount of taxes to be allowed on a non-Wherry Act leasehold basis (Tr. 355, Tr. 369). These taxes were void because they were discriminatory against the Federal lessees. The action of the court should have been to declare them void. The state law, as construed by the Washington Supreme Court in *Moses Lake Homes, Inc. v. Grant County*, 51 Wn.(2d) 281, 317 P.(2d) 1069, is void insofar as it undertakes to single out Wherry Act leaseholders for a discriminatory tax.

In a similar situation, this court in *Phillips Chemical Co. v. Dumas Independent School District*, 361 U. S. 376, 4 L.Ed.(2d) 384, simply concluded:

"Therefore, this tax may not be exacted."

A similar disposition is the limit of the Federal court's authority in this case. Actually, all the court had before it was taxes *as they were levied and assessed*. Courts deal with cases on the basis of the state of facts actually before them and never with nonexistent or assumed circum-



stances, 21 C.J.S., Courts, 292, Section 182; *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 81 L.Ed. 953.

The facts that were before the court are that the state law had been construed by the highest appellate court of the state as necessitating discriminatory treatment of Federal leaseholders. The state law provides no other mode of levying these taxes. Federal courts do not have the authority to revise or reconstrue the state law as interpreted by its highest court, *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 74 L.Ed. 1107. A revision or interpretation of the state law is exclusively the function of the state legislature or the state courts. In order for this court to permit the assessor to make a valid, nondiscriminatory levy on a non-Wherry Act leasehold basis for 1955, 1956 and 1957, the court in effect had to tell him that the law of the State of Washington is something other than the Supreme Court of the State of Washington has said that it is, and that he has authority in spite of the statutes of the state to exact taxes on a non-Wherry Act leasehold basis. That is approximately what the Circuit Court of Appeals has done in its opinion with respect to the cross-appeal of Grant County, wherein it has held that the discriminatory tax is not void but that the discrimination only requires that the amount collectible be reduced to what it would have been had the tax been.

levied on a non-Wherry Act leasehold basis. That determination tells the assessor that under the laws of the State of Washington he can levy taxes against a Wherry Act leaseholder on a non-Wherry Act leasehold basis, notwithstanding that the State Supreme Court has indicated that under the laws of the State of Washington the tax is to be levied in another manner. The court is thus undertaking to construe the Washington law in a manner contrary to the decisions of the state's highest court.

The power of the Circuit Court was confined to the determination of whether under the state law the tax, as presented to it, was valid, and the court did not have the right to construe the state law to mean something different from what the state's highest court had announced it to be.

This tax, under the law announced by the Supreme Court of Washington, like that under the law of Texas rejected by this court in *Phillips Chemical Co. v. Dumas Independent School District*, 361 U. S. 376, 4 L.Ed.(2d) 579, "may not be exacted."

The court should have dealt only with the tax assessment and levy proceedings *before it*, and should have determined that these were void. The matter of what further action the state officials might undertake within the authority conferred upon them by state law should not concern the court at this time, and it was error for the Circuit

Court of Appeals to indicate that the tax assessed and levied in a discriminatory manner might now be collected on a non-Wherry Act leasehold basis, when the highest court of the state has held otherwise.

A review by the court of the decision of the Circuit Court of Appeals is necessary:

(1) to settle the matter of first impression as to the applicability of Section 511 of the Housing Act of 1956;

(2) to bring the decision of the Circuit Court of Appeals into conformity with the decisions of this court with respect to discriminatory taxation of Federal contractors.

Respectfully submitted,

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By

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APPENDIX A

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

MOSES LAKE HOMES, INC.,

v.

*Appellant,*

GRANT COUNTY,

*Appellee and Cross-Appellant,*

LARSONAIRE HOMES, INC.,  
LARSON HEIGHTS, INC., and  
MOSES LAKE HOMES, INC.,

*Cross-Appellees.*

No. 16,234

Jan. 25, 1960

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF WASHINGTON  
NORTHERN DIVISION

Before: Barnes, Hamley and Jerlberg, Circuit Judges  
HAMLEY, Circuit Judge:

This proceeding is collateral to a federal condemnation action now pending in the district court. It involves the claim of Grant County, Washington, to a substantial part of the sums deposited in court by the government as estimated compensation. The claim, resisted by the three condemnies, is for unpaid personal property taxes assertedly levied against the leaseholds which are being condemned.

The federal district court entered a judgment granting the county's claim in part. Moses Lake Homes, Inc., one of the condemnees for whom the sums were deposited, has appealed. Grant County has cross-appealed against all three condemnees.<sup>1</sup>

The questions here presented are whether the tax liens on which the county relies are valid under state law and if so what part, if any, of the taxes thereby secured may be collected in view of the restrictions imposed by Section 511 of the Housing Act of 1956.<sup>2</sup>

The condemnees, in addition to Moses Lake, are Larsonaire Homes, Inc., and Larson Heights, Inc. All three were sponsors of Wherry Act housing projects on Larson Air Force Base in Grant County, Washington. As sponsors they entered into separate leases with the United States pursuant to sections 801 to 809 of Title VIII of the National Housing Act, 12 U.S.C.A. §§ 1748, 1748a to h. The Moses Lake lease was entered into on May 31, 1950, the Larsonaire lease on August 6, 1953, and the Larson Heights lease on August 2, 1954.

By the terms of each lease the respective lessees were

<sup>1</sup>The judgment did not terminate the condemnation action since the issues to be determined in fixing final compensation were not adjudicated. The court, however, made the express determination and direction provided for in Rule 54(b), Federal Rules of Civil Procedure, 28 U.S.C.A. This court therefore has jurisdiction to entertain the appeal and cross-appeal.

<sup>2</sup>Enacted August 7, 1956, 70 Stat. 1110, 42 U.S.C.A. § 1594, Historical Note.

to erect, maintain, and operate on the military reservation a housing project for a period of seventy-five years unless sooner terminated by the government. The projects were financed by F.H.A. insured loans. The housing units were to be leased to military and civilian personnel assigned by the military commander.

Under the terms of these leases the buildings and improvements, as completed, became real estate and property of the United States. Upon expiration of the leases or their earlier termination all such improvements were to remain the property of the government without further compensation. Since the completion of the buildings and improvements and until March 1, 1958, the respective sponsors operated the rental housing projects in the manner contemplated by the leases.

In June, 1954, the assessor of Grant County listed the physical improvements placed upon the land by Moses Lake Homes, Inc., on his "Detail and Assessment List," for 1955 taxes. Moses Lake brought an action in the Superior Court of the State of Washington for Grant County to enjoin the levy of any taxes on its housing units for the year 1955 or thereafter. An injunction as prayed for was entered, and Grant County and the State of Washington appealed to the state supreme court. In a decision rendered on June 28, 1956, the supreme court reversed and remanded the case for a new trial because the trial court



had not permitted the State of Washington to intervene. *Moses Lake Homes v. Grant County*, 49 Wn.(2d) 182, 299 P.(2d) 840.

Following the second trial, a judgment enjoining Grant County from levying any taxes on the housing units of Moses Lake for the year 1955 or thereafter was again entered. Grant County and the State of Washington once more appealed. In its second decision, the Washington Supreme Court held that in view of *Offutt Housing Co. v. County of Sarpy*, 351 U. S. 253, a tax on the leasehold could be measured by the value of the buildings. The judgment enjoining the levying of such taxes for 1955 and subsequent years was accordingly reversed. *Moses Lake Homes v. Grant County*, 51 Wn.(2d) 285, 317 P.(2d) 1069, decided November 14, 1957. The injunction was dissolved in December, 1957.

Thereafter and before the end of 1957, Grant County levied on the Moses Lake property for 1955 taxes pursuant to the assessment previously made. Before the end of 1957 the county also listed and levied upon the Wherry Act property of Moses Lake for the years 1956, 1957 and 1958. At the same time it listed and levied upon the Wherry Act property of Larsonaire for the years 1956, 1957 and 1958; and upon the like property of Larson Heights for

the years 1957 and 1958.<sup>3</sup> The listing was done on detail lists of personal property as omitted property for those years, pursuant to Revised Code of Washington 84.40.080.

On January 21, 1958, the county treasurer issued distraint and tax sale notices describing the improvements on the Wherry Act housing projects operated by the three companies in question.<sup>4</sup> On March 1, 1958, the United States instituted a condemnation suit in the United States District Court for the Eastern District of Washington, seeking to acquire the described leasehold interests of Moses Lake, Larsonaire, and Larson Heights. At the same time a declaration of taking was filed, in connection with which the government deposited \$253,000 in the registry of the court as estimated compensation.<sup>5</sup>

On March 12, 1958, the government applied for and obtained an order temporarily restraining Grant County

<sup>3</sup>The taxes thus levied for the indicated years are as follows:

Year—Moses Lake—Larsonaire—Larson Heights

| Year | Moses Lake | Larsonaire | Larson Heights |
|------|------------|------------|----------------|
| 1955 | \$21,150   |            |                |
| 1956 | 32,925     | \$21,750   |                |
| 1957 | 31,330     | 18,798     | \$18,798       |
| 1958 | 22,575     | 14,145     | 14,145         |

In addition, Grant County later sought to levy taxes against each of the sponsors for 1959 in the following sums: Moses Lake, \$22,575; Larsonaire, \$14,145; and Larson Heights, \$14,145.

<sup>4</sup>The tax years dealt with in these distraint and tax sale notices are as follows: Moses Lake, 1955, 1956, and 1957; Larsonaire, 1956 and 1957; and Larson Heights, 1957.

<sup>5</sup>The deposited sum was allocated between the leasehold interests of the three condemnees as follows: Moses Lake, \$126,500; Larsonaire, \$65,300; Larson Heights, \$61,200.

from proceeding with the tax sale referred to above. This restraining order was superseded on March 28, 1958, by a preliminary injunction to the same effect.

Petitions on behalf of the condemnees were filed with the district court on March 26, 1958, requesting orders directing payment to them of the respective amounts deposited in the registry of the court. On April 8, 1958, Grant County petitioned the district court for an order directing payment to it of most of the \$253,000 which had been deposited by the government.<sup>6</sup>

The hearing on these counterclaims led to entry on July 3, 1958, of the judgment here under review.<sup>7</sup> As be-

<sup>6</sup>With regard to Moses Lake, the county's claim was based on asserted unpaid taxes in the total amount of \$130,555 for the years 1955 through 1959, together with interest in the sum of \$11,730.73 to March 1, 1958, for the years 1955 through 1957. The total amount so claimed against Moses Lake was \$142,285.73, which is in excess of the amount deposited for that condemnee by the United States. See footnote 5.

With regard to Larsonaire, the county's claim was based on asserted unpaid taxes in the total amount of \$68,838 for the years 1956 through 1959. The total amount so claimed against Larsonaire was thus in excess of the amount claimed by Larsonaire (\$65,300) deposited for that condemnee. See footnote 5. With regard to Larson Heights, the county's claim was based on asserted unpaid taxes in the total amount of \$47,088 for the years 1957 through 1959. The total amount so claimed against Larson Heights was thus \$14,112 less than the \$61,200 which had been deposited for that condemnee. See footnote 5.

The aggregate of the unpaid taxes and interest which was made the basis of the county's claim against the funds deposited for the three condemnees was \$258,211.73. However, by reason of the distribution of the deposited funds as between the condemnees, the county's total recovery, if it had prevailed completely, would have been \$238,888. The only portion of the deposit which would not have gone to the county would have been the \$14,112 balance to the credit of Larson Heights.

<sup>7</sup>Preparatory to the hearing on these motions, requests for admissions and responses thereto, together with certain exhibits, were filed. Additional exhibits were received at the hearing.

fore noted, the tax claims were denied except as to Moses Lake for the years 1955 and 1956. The petitions of the condemnees were granted in full except for a deduction in the case of Moses Lake sufficient to pay 1955 taxes in the sum of \$21,150, and 1956 taxes in the sum of \$32,925, together with interest.

*Appeal of Moses Lake Homes, Inc.*

We first consider the appeal of Moses Lake from that part of the judgment which allowed the tax claims against it for the years 1955 and 1956. Appellant contends that for either one of two reasons the court erred in allowing the county's claim for those years. The first such reason, according to appellant, is that no tax was validly levied for 1955 or 1956 upon the Moses Lake property taken in the condemnation proceeding.

The condemnation action is one to condemn leasehold interests, together with associated easements and contract rights. The government is not condemning physical improvements on the military reservation. Under the terms of the lease it already owns those improvements. It follows that if Grant County has an enforceable claim against the deposited sums for 1955 and 1956 taxes it must be based on a valid levy against the leasehold interest of Moses Lake for those years and a tax lien arising therefrom.

Appellant argues that Grant County did not undertake to levy taxes against the leasehold interest of Moses Lake for 1955 or 1956 taxes. Instead, it is asserted, the county made an attempt to levy a tax for those years upon the physical improvements which Moses Lake constructed on the leasehold. This attempt was abortive, it is contended, because the improvements became the property of the government as soon as they were completed, and so Moses Lake had no interest therein which could be taxed.<sup>8</sup>

In support of this argument appellant points to RCW 84.40.020, which provides that all personal property subject to taxation shall be listed and assessed every year.<sup>9</sup> It is provided in RCW 84.40.050 that the tax commission shall prescribe suitable forms of detail and assessment lists or schedules to be used by assessors for the listing, assessment, and equalization of property for tax purposes.

In listing and assessing the property here in question for 1955 and 1956 taxes, the county assessor apparently used the forms prescribed by the tax commission pursuant

<sup>8</sup>Unnecessary to support this contention is Moses Lake's further contention that under the common law of Washington buildings permanently erected on real property are real property. With respect to improvements upon lands owned by the United States, RCW 84.04.080 provides a different rule. See footnote 9, *infra*.

<sup>9</sup>As defined in RCW 84.04.080, personal property includes "all leases of real property and leasehold interests therein for a term less than the life of the holder; [and] all improvements upon lands the fee of which is still vested in the United States. . . ."

to RCW 84.40.050. However, he made no entry on these forms under item 28 entitled "Leaseholds." Instead, the listing was made under item 27 entitled "Improvements upon land the fee of which is vested in the United States, the state, or any political subdivision thereof."<sup>10</sup> At no stage in the subsequent taxing procedure with respect to these years was any reference made to leasehold interests. As before noted, the distraint proceedings later instituted were purportedly directed against the physical improvements and not the leasehold interest of Moses Lake.

Grant County argues that the doctrine of res judicata precludes Moses Lake from attacking the validity of the 1955 and 1956 levies on the ground referred to above, or on any other ground. The county points out that in the prior state court proceedings referred to above Moses Lake unsuccessfully attacked the validity of these levies.

In the first appeal in the state court action challenging these levies, Moses Lake contended that the county was attempting to levy and collect an ad valorem tax on the buildings, whereas only the leasehold was subject to tax. This is precisely the same contention which Moses Lake advances in the instant suit. In the state court action, however, the contention referred to was not grounded on the

<sup>10</sup>In the case of Moses Lake the assessment noted under item 27 in the Detail List of Personal Property was \$500,000, with this notation on the reverse side: "This listing covers 400 rental units at Larson Air Force Base near Moses Lake, Wash."



point here made, that incorrect entries were made on the detail and assessment lists. The latter point is nevertheless one which Moses Lake could have made in the state court action.

In the second appeal in the state court action the attack upon the validity of the levies was construed by the state supreme court as being based on a somewhat different contention. This was the contention that the levies were invalid because the county sought to measure a tax on a leasehold by the value of the buildings. But, again, Moses Lake did not argue, though it could have, that the levies were invalid because improper entries were made on the detail and assessment lists.

A judgment upon the merits in a state court action is res judicata in a subsequent federal court action where the parties and subject matter are the same. This is true not only with regard to matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end. *Grubb v. Public Utilities Commission of Ohio*, 281 U. S. 470.

It is therefore our view that the judgment of the Washington Supreme Court upholding the validity of the levies "for the year 1955 and thereafter"<sup>11</sup> is res judicata on the

<sup>11</sup>*Moses Lake Homes v. Grant County*, 51 Wn.(2d) 285, 317 P.(2d) 1069.

question here raised as to the validity of those levies. Regardless of the manner in which entries were made on the detail and assessment list, we therefore hold that the levies against Moses Lake for 1955 and 1956 taxes were validly directed against the company's leasehold interest.

This being the nature of the levies, the validity thereof is not open to challenge on the ground that the value of the leasehold was measured by the value of the improvements. *Offutt Housing Co. v. County of Sarpy, supra*; *Moses Lake Homes v. Grant County*, 51 Wn.(2d) 285, 317 P.(2d) 1069.

The alternative reason advanced by Moses Lake why the court erred in allowing the county's claim against the funds deposited for Moses Lake, based on unpaid taxes for 1955 and 1956, is that the collection of the taxes for those years is forbidden, under the circumstances of this case, by Section 511 of the Housing Act of 1956.

Section 511 amends Section 408 of the Housing Amendments of 1955, 69 Stat. 653, to provide that no state or local taxes on Wherry Housing project lessees from the United States, "not paid or encumbering such property or interest prior to June 15, 1956," shall exceed the amount of taxes or assessments on other similar property of similar

value, less specified offsets as determined by the Secretary of Defense or his designee.<sup>12</sup>

The trial court held that the restrictions on taxation imposed by Section 511 do not apply with regard to the 1955 and 1956 taxes levied against the leasehold of Moses Lake. This ruling was based on the view that the liens for those taxes are to be regarded as encumbering the leasehold prior to June 15, 1956.

In reaching this conclusion the court expressed the opinion that taxes do not become a lien until levied, and noted that the taxes for 1955 and 1956 were not levied until December, 1957. But, the court stated, the levies for 1955 and 1956 taxes would have been made in October, 1954 and 1955, respectively, but for the injunction, later proved to be erroneous, obtained by Moses Lake. Under these special circumstances, it was held, the liens

<sup>12</sup>Section 511 reads in its material portion as follows:

"Sec. 511. Section 408 of the Housing Amendments of 1955 is amended by adding at the end thereof the following: 'Nothing contained in the provisions of title VIII of the National Housing Act in effect prior to August 11, 1955, or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by a mortgage insured under such provisions of title VIII: *Provided*, That, no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government of the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other services or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to such other similar property.' . . ."

for 1955 and 1956 taxes should be regarded as encumbering the property prior to June 15, 1956.

Appellant argues that it is immaterial what brought about the situation that delayed the perfecting of the liens for 1955 and 1956 taxes until after June 15, 1956. The fact remains and is here controlling, appellant asserts, that the liens for those years did not come into existence so as to encumber the property until after June 15, 1956. It is pure speculation, appellant also contends, whether in the absence of the injunction the levies would have been made prior to that date.

We will first consider the lien for 1955 taxes. In June, 1954, the county assessor listed and placed a valuation on the Moses Lake property for purposes of levying the 1955 tax thereon. The property so listed and valued then became subject to RCW 84.60.030, the applicable part of which reads as follows:

"The taxes assessed upon each item of personal property assessed shall be a lien upon such personal property from and after the date upon which it is listed with and valued by the county assessor, and no sale or transfer of such property shall in any way affect the lien of such taxes thereon."

The lien referred to in RCW 84.60.030, however, is only inchoate at the time of listing and valuation. See *State of Washington v. Snohomish County*, 71 Wash. 320,

128 Pac. 667. It is not enforceable until there is a valid tax for that year which the lien may secure. There can be no valid tax until there has been a levy specifying the amount thereof. *Puget Sound Power & Light Co. v. Cowlitz County*, 38 Wn.(2d) 907, 234 P.(2d) 506, 511. If no 1955 tax had been thereafter levied, or if the property had passed into public ownership prior to such levy, the lien for 1955 taxes would never have matured into an enforceable lien. But in the meantime, and unless defeated by one of these circumstances, it was an encumbrance upon the property which prevented third persons from gaining intervening rights.

The lien for 1955 taxes on the Moses Lake leasehold was not defeated by failure to levy a tax or by passage of the leasehold into public ownership. A tax on this leasehold for 1955 taxes was levied in December, 1957, following dissolution of the injunction. When the levy was made the leasehold in question remained in private ownership.<sup>13</sup> The levy was therefore valid and upon being made became effective by relation back to the time when the inchoate lien first came into existence.<sup>14</sup>

<sup>13</sup> The declaration of taking was not filed until March 1, 1958.

<sup>14</sup> For other examples of the doctrine of relation back, as applied to tax liens arising under somewhat analogous statutes, see *United States v. Alabama*, 313 U.S. 274; *United States v. Sampsell*, 9 Cir., 153 F.(2d) 731; *Allén v. Beinix*, 99 N.H. 247, 108 A.(2d) 549.

We hold that an inchoate tax lien, in existence prior to June 15, 1956, which thereafter becomes fully effective by relation back from the date of a subsequent valid levy, is a tax encumbrance prior to June 15, 1956, within the meaning of Section 511. It follows that the 1955 taxes levied against the leasehold of Moses Lake are not affected by the restrictions imposed by Section 511.

With regard to the 1956 taxes levied against the leasehold of Moses Lake, the facts are different. By reason of the injunction obtained by Moses Lake in the late summer or early fall of 1954, the leasehold was not listed and valued for 1956 until December, 1957. It follows that no inchoate lien came into existence prior to June 15, 1956. In our view, however, the taxes which in the normal course of statutory procedure would have encumbered a taxpayer's property or interest prior to June 15, 1956, are to be regarded as having done so, where such is prevented only by procedural obstacles interposed by the taxpayer. Congress could not have intended that taxpayers may, by instituting misconceived injunction proceedings, deny state and local governments the benefit of the June 15, 1956, saving clause included in Section 511.

The view just expressed is based upon the assumption that but for the injunction the assessor would have listed and valued the leasehold for 1956 taxes prior to June 15, 1956. It was his statutory duty under RCW 84.40.040 to



do this between December 1, 1954, and May 31, 1955. He performed the similar statutory duty in the preceding year, and the attorneys representing Moses Lake apparently thought that he would do so again unless enjoined. In view of these circumstances, we do not regard the assumption we have made as unduly speculative.

For the reasons indicated, it is our opinion that the 1956 taxes levied against the leasehold of Moses Lake, as well as the 1955 taxes, are not affected by the restrictions imposed by Section 511.<sup>15</sup>

This disposes of the questions raised on the appeal of Moses Lake, and calls for an affirmance of that part of the judgment which recognizes the county's claim against the funds deposited for Moses Lake based on taxes levied against that company for 1955 and 1956.

#### *Cross-Appeal of Grant County*

We turn now to the cross-appeal of Grant County. The county cross-appeals from that part of the judgment which disallows its tax claims against the deposited funds for the 1957 through 1959 taxes levied against Moses Lake, the 1956 through 1959 taxes levied against Larsonaire, and the 1957 through 1959 taxes levied against Larson Heights.

<sup>15</sup>It will be noted that the views expressed above, to the effect that the 1956 taxes levied against Moses Lake are not affected by Section 511, apply with like effect to the 1955 taxes levied against that company.

The trial court disallowed the tax claims against the three condemnees for these years on the ground that the collection of such taxes is subject to the restrictions imposed by Section 511 and that in view of those restrictions no such taxes were collectible.

We direct our attention first to the disallowed tax claims made against the funds deposited for Moses Lake.

For the reasons stated above, it is our view that the 1957 taxes levied against the leasehold of Moses Lake are not subject to the restrictions imposed by Section 511. But for the injunction that leasehold would have been listed and valued for 1957 taxes prior to June 15, 1956. An inchoate lien would then have come into existence which, when the tax was thereafter levied, would have become fully effective, by relation back, to a date prior to June 15, 1956. By its own conduct in securing an injunction, Moses Lake prevented this inchoate lien from coming into existence prior to June 15, 1956. As in the case of the 1956 taxes on this leasehold, we will, under these circumstances, consider that a Section 511 encumbrance attached prior to June 15, 1956.

We therefore hold that the trial court erred in disallowing the county's claim for 1957 personal property taxes against the funds deposited for Moses Lake.

With regard to the 1958 tax levied against Moses Lake,

no inchoate lien could have come into existence prior to December 1, 1956. This was the first day on which the assessor, even if unrestrained by court order, could have listed and valued the leasehold for 1958 taxes. See RCW 84.40.040. Since no inchoate lien for 1958 taxes could have come into existence prior to June 15, 1956, the limitations on tax payments set out in Section 511 apply thereto.

Under that section the amount of taxes or assessments on a Wherry Act housing project leasehold not paid or encumbering such property or interest prior to June 15, 1956, may not exceed the amount of taxes or assessments on other similar property of similar value less certain offsets.

The trial court held that under Washington law the valuation of leaseholds for tax purposes other than Wherry Act project leaseholds must be measured by the market value of the leasehold considered in the light of its burdens and benefits.<sup>16</sup> The court further held that with respect to Wherry Act leaseholds the valuation must be measured by the full value of the buildings and improvements.<sup>17</sup> The court concluded from this that under Wash-

<sup>16</sup>In support of this view concerning the Washington law, the court cited *In re Metropolitan Building Co.*, 144 Wash. 469, 258 Pac. 473; *Metropolitan Building Co. v. King County*, 72 Wash. 47, 129 Pac. 883; *Metropolitan Building Co. v. King County*, 62 Wash. 409, 113 Pac. 1114.

<sup>17</sup>See *Moses Lake Homes v. Grant County*, 51 Wn. (2d) 285, 317 P. (2d) 1069, in which the value of this same Wherry Act project leasehold was measured by the full value of the buildings and improvements.

ington law housing projects are levied upon a basis different and higher than the amount of taxes and assessments on other similar property of similar value.

At the oral argument counsel for Grant County contended that in Washington the rule that the value of non-Wherry Act leaseholds is to be measured by market value considered in the light of the burdens and benefits of the leasehold applies only where the improvements are of a kind which will outlast the leasehold. Where the improvements will not outlast the lease, it was argued, the value of the leasehold for tax purposes may be measured by the value of the improvements. *Percival v. Thurston County*, 14 Wash. 586, 45 Pac. 159, decided in 1896, was cited as authority for this proposition.

The *Percival* case is not in point. No lease was involved. Thurston County was seeking to levy an ad valorem tax upon improvements the taxpayer had built upon state-owned tidelands. The *Metropolitan Building Company* cases and this case, on the other hand, involve the taxation of leasehold interests. The trial court correctly held that the valuation rule applied in the *Metropolitan Building Company* cases is applicable with regard to all non-Wherry Act leaseholds.

The trial court's further finding that a different method was used in valuing the Wherry Act project leaseholds

here in question is also correct. Likewise to be sustained is the court's finding that the method used in assessing the Moses Lake leaseholds resulted in a higher tax than would have been true in the case of a non-Wherry Act leasehold.<sup>18</sup>

Under Section 511, however, the fact that the taxes are higher does not invalidate the entire tax. It only requires that the amount collectible be reduced to what it would have been if the tax had been levied on a non-Wherry Act leasehold basis.

Hence, to give effect to this part of Section 511, where it is found that the assessing method used was different and produced a higher tax, it is also necessary to find the amount of the excess so that a partial or total offset may be effectuated. No such finding was here made, nor do we find any facts of record which would support such a finding.

On the present state of the record, therefore, the conclusion reached by the trial court that utilization of a different assessment method called for disallowance of

<sup>18</sup>The Moses Lake leasehold was heavily encumbered by a mortgage. The amortization of this indebtedness was not taken into account in assessing the leasehold, as only the value of the physical improvements was considered. But had the valuation of the leasehold been measured by its market value considered in the light of its burdens and benefits, the necessity of amortizing the mortgage would have been taken into account. See *In re Assessment of Metropolitan Building Co.*, 144 Wash. 469, 258 Pac. 473, 476. Had it been taken into account, the assessed value for 1958 and therefore the levied tax would have been substantially lower, though we do not know how much lower.

the county's 1958 tax claim against Moses Lake cannot be sustained.<sup>19</sup>

But the trial court also held that the claim against Moses Lake for 1958 taxes, as well as the claim against Moses Lake, Larsonaire, and Larson Heights for the other years referred to in footnote 19, must be disallowed because of the other offsets which were designated pursuant to Section 511.

This ruling was based on a finding that on September 4, 1957, the authorized representative of the Secretary of the Air Force had determined that offsets totaling \$111,358.65 must be taken into account.<sup>20</sup> According to this

<sup>19</sup>The court also found that for the same reason it was necessary to disallow the county's 1957 tax claim against Moses Lake, its 1956, 1957, and 1958 tax claims against Larsonaire, and its 1957 and 1958 tax claims against Larson Heights. The view has been expressed above that Section 511 does not apply to the 1957 tax claim against Moses Lake. The county's tax claims against the other two condemnees are discussed below.

<sup>20</sup>The Secretary's designation reads as follows:

"Department of the Air Force  
Washington

Office of the Secretary

4 Sep 1957.

#### DETERMINATION

"Subject: Determination under Section 408 of the Housing Amendments of 1955, as amended: Larson Air Force Base, Washington (FHA Projects Nos. 171-80001-7-8)

1. I have considered the information with respect to the subject project, the lessee of which believes that the tax for 1956 will be equal to approximately \$65,000.00. Pursuant to my designation under Section 408 of the Housing Amendments of 1955, 69 Stat. 653, as amended by Section 511 of the Housing Act of 1956, 70 Stat. 1410, I have determined \$111,358.65 to be equal to (1) any payments made by the Federal Government to the local taxing or other agencies involved with respect to such property; plus (2) such amount as may be appropriate for expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, roads, sidewalks, curbs, gutters, water and sewer system, fire lines and hydrants, playgrounds, street lighting, fire protection, garbage disposal, snow



finding, this sum was equal to the payments, as defined in clause (1) under the first proviso of Section 511, made by the federal government to local taxing and other agencies involved with respect to the three leaseholds, plus the expenditures made by the federal government or the lessees for government facilities and services of the kind described in clause (2) under this proviso. The court further found that in making its assessments of taxes

removal and sewer service, or any other service or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to other similar property of similar value. This determination is not to be considered an expression of opinion by me or the Department of Defense with respect to the validity or propriety of the tax bills to which it is applied.

"2. The items included in this determination are as follows:

"Payments for operation of schools pertaining to dependents living in Wherry projects pursuant to P. L. 874, 61st Congress: \$46,646.57.

"Funds paid under P. L. 615 for years January 1953 to June 1956, inclusive, \$94,092.00 depreciated at 4%: \$3,763.68.

"Appropriate amounts for expenditures for services and facilities.

"Provisions by Air Force of streets, curbs, and sidewalks not including entrance walks and drives, cost \$65,658.56, amortized 25 yrs. life: \$2,626.35.

"Provision by lessees of streets and street signs, cost \$106,416.91, amortized 25 yrs. life: \$4,258.68.

"Provision by Air Force of water and sewer system, cost \$132,761.00, amortized 25 yrs. life: \$5,310.44.

"Provisions by lessees of curbs and sidewalks, cost \$103,726.51, amortized 25 yrs. life: \$4,149.06.

"Provision by lessees of water and sewer system, cost \$185,426.00, amortized 25 yrs. life: \$7,417.04.

"Expenditures by Lessee:

"Street lighting: \$1,708.80; Sewer charge: \$2,800.00; Sewer line maintenance: \$250.00; Street maintenance and repair: \$682.02; Street sanding: \$100.00; Playground maintenance: \$2,100.00.

"Expenditures by Air Force:

"Police Protection: \$23,248.00; Access Roads—Maintenance: \$6,300.00.

"3. The Chief, Family Housing Division, Directorate of Facilities Support, D.C.S./O., will make copies of this determination available to all interested parties.

"/s/ GEORGE S. ROBINSON  
Deputy Special Assistant for  
Installations"

against the three lessees Grant County did not give any credit or consideration to this \$111,358.65 determination.

The county, however, advances several reasons why in its opinion the Secretary's determinations are "totally useless" and should therefore have been disregarded by the court. The first of these is that the designated offsets were not segregated with regard to the individual taxpayers, but only an unsegregated designation covering all three leaseholds at Larson Air Force Base was made.

It is true that no segregation was made. The question is whether under Section 511 such a segregation was required.

Some support for the county's view is to be found in the use in Section 511 of such terms as "the interest of a lessee," "the interest of such lessee," "with respect to such property," and "the lessee." It can be argued that the use of the singular number in referring to Wherry Act lessees and Wherry Act project properties evidences an intent to require that the designation of offsetting payments and expenditures under clause (2) of the proviso be allocated as between individual lessees and leaseholds.

However, when regard is had to the underlying purpose of Congress in enacting this statute, we believe that such a construction of Section 511 is not warranted. As indicated in the report of the House Committee on Banking

and Currency on the bill which became the Housing Act of 1956,<sup>21</sup> this legislation was an outgrowth of the decision of the United States Supreme Court on May 28, 1956, in *Offutt Housing Company v. County of Sarpy*, 351 U. S. 253. The committee report points out that this decision upheld the right of local taxing officials to levy personal property taxes against the lessee's interest in a Wherry Act project, measured by the full value of the buildings and improvements.

It is stated in the committee report that a large portion of the projects have not been subjected to such local taxes in the past, and as a consequence the federal government has frequently made payments to local taxing officials in lieu of taxes in exchange for usual services, such as schools, furnished to the projects. Moreover, as the report notes, many expenditures have been made by the federal government for streets, utilities, schools and for other services normally furnished by taxing bodies. Now that the right of local taxing agencies to tax such leaseholds has been recognized, the committee report states, it had become important "that no payments be made to communities which would constitute a windfall over and above normal taxes."

This purpose of avoiding windfalls to taxing com-

<sup>21</sup>House Report No. 2363, 84th Cong., 2d Session, accompanying H.R. 11742, 3 U. S. Code Congressional and Administrative News, 84th Cong. 2d Session, Page 4509, at 4555-4556.

munities could not be achieved unless all payments and expenditures of the kind described in clauses (1) and (2) of the proviso, made in connection with the operation of a particular military installation, were permitted to be set off against the taxes levied against Wherry Act leaseholds located thereon. For example, if with respect to a particular Wherry Act leasehold the aggregate of the clause (1) and (2) payments and expenditures is \$10,000, and the tax levied against the leasehold is \$5,000, the tax would be set off and a balance of \$5,000 would remain. Unless the government could set off this sum against the tax levied for the same year on another Wherry Act leasehold on the same military installation, the local taxing unit would receive a windfall in that amount.

Thus it is that the purpose of the enactment can be realized only if all such payments and expenditures are aggregated together in the Secretary's designation, without regard to the particular leaseholds situated on the military installation. If, as will undoubtedly occur in some cases, the clause (1) and (2) offsets are less than the taxes levied against all leaseholds on a particular base, an allocation of offsets as between lessees is necessary in order to compute their individual net taxes. But such an allocation is a matter of interest only to the taxing agency and the taxpayers, and so need not be dealt with in the Secretary's designation.

We accordingly hold that the designation of offsets here in question made pursuant to Section 511 is not to be disregarded because it did not allocate the offsetting items as between the three Wherry Act project lessees involved in this case.<sup>22</sup>

The second objection which the county makes to the Secretary's designation of offsets in the amount of \$111,358.65 is that it is not limited to payments and expenditures made after June 15, 1956. The date referred to is that which is named in the first sentence of the proviso to Section 511.<sup>23</sup> It is the county's contention that Section 511 does not contemplate the designation as offsets of clause (1) and (2) payments and expenditures which were made before June 15, 1956.

Examination of the determination in question indicates that the itemized offsets are not expressly limited to payments and expenditures made after June 15, 1956. With regard to one item the contrary is indicated.<sup>24</sup>

<sup>22</sup>While the particular matter now under discussion is the county's tax claim against Moses Lake for 1958, the ruling just stated applies with like effect to the county's 1956, 1957, and 1958 tax claims against Larsonaire, and its 1957 and 1958 tax claims against Larson Heights. See footnote 19.

<sup>23</sup>In Section 511 the date is used in this context:

"... Provided, That, no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed . . . ."

<sup>24</sup>The second item under paragraph 2 of the determination reads: "Funds paid under P. L. 615 for years January 1953 to June 1956, inclusive, \$94,092.00 depreciated at 4%: \$3,763.68." The \$3,763.68 designated under this item thus represents the annual sum necessary to amor-

In our view, designations made under the proviso of Section 511 may properly include sums representing *annual amortization of capital expenditures* made prior to June 15, 1956. Such annual amortization sums, realistically considered, represent the amounts which the local government would have had to pay in the years subsequent to June 15, 1956, had the local government made these capital expenditures.

On the other hand, we do not believe that the proviso of Section 511 authorizes the inclusion in the Secretary's designation of any part of noncapital expenditures made prior to June 15, 1956. Congress sought to prevent local taxing units from receiving windfalls after June 15, 1956. It would receive a windfall after that date if credit could not be taken for the sums necessary to be paid annually in order to amortize capital expenditures made prior thereto. It would not receive a windfall after that date if credit could not be taken for noncapital expenditures made prior thereto, since local government does not normally amortize such expenditures over a period of years.

It is not possible to determine whether the Secretary's *tize over twenty-five years capital expenditures made between January 1953 and June 1956.*

This Public Law citation is incomplete and erroneous. It should be "Public Law 815, 81st Cong., 2d Sess., 64 Stat. 967." This act relates to the construction of school facilities in areas affected by federal activities. It may also be noted that the citation "P. L. 874, 61st Cong." in the immediately preceding item of the designation is likewise erroneous. The reference intended was probably Public Law 874, 81st Cong., 2d Sess., 64 Stat. 1100, which relates to the providing of financial assistance for local educational agencies in areas affected by federal activities.



designation is so limited with regard to expenditures made prior to June 15, 1956. It was therefore error to use that determination in its present form as a basis for denying the county's tax claims.

The third objection which the county makes to the Secretary's designation of offsets is that such offsets were not designated with regard to specific tax years, but only for an unidentified and unsegregated number of years.

The parties have apparently assumed that the \$111,358.65 designation is intended to include all credits due at the time the determination was made on September 4, 1957. But examination of the designation quoted in footnote 20 indicates that with regard to six items the payments and expenses are attributed to a single year. These are the items referred to in footnote 24 and the five items listed under "Appropriate amounts for expenditures for services and facilities." Each of the latter items describes a capital outlay in a certain amount, but then designates approximately four per cent of such outlay as the offset, with the explanation "amortized 25 yrs. life." It would appear that the designation of these net items was intended to be reapplied during each of the twenty-five years that the indicated capital outlays were being amortized.<sup>25</sup>

<sup>25</sup>In the first sentence of the designation it is stated that "the lessee of which believes that the tax for 1956 will be equal to approximately \$65,000.00." It is difficult to account for this statement except upon the

It is in any event true, as the county asserts, that the offsets were not designated with regard to specific tax years, but only for an unidentified and unsegregated number of years. If, therefore, Section 511 requires that designated offsets be related to specific tax years, it was error to use the designation as a basis for denying the county's 1958 tax claim against Moses Lake.<sup>26</sup>

The proviso to Section 511, it will be noted, first recites that no taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee "shall exceed the amount of taxes or assessments on other similar property of similar value...." Thus, a year-by-year comparison is required between the taxes or assessments actually levied or made with respect to the Wherry Act leasehold for a particular year and those which were levied or made on other similar property of similar value for the same year.

The proviso then goes on to state in effect that the tax or assessment levied or made for a particular year,

hypothesis that the designation was intended as an offset for 1956 taxes only. It is likewise difficult to account for the \$65,000 figure which appears in this statement. Larson Heights had no tax for 1956. The 1956 tax for Moses Lake was \$32,925, and for Moses Lake and Larsonaire together, \$54,675.

<sup>26</sup>It may be noted that the Secretary does not always omit an allocation as to tax years in making these designations. It the designation involved in *Air Base Housing, Inc. v. Spokane County*, No. 35261, now pending on appeal before the Washington Supreme Court, the designation was \$109,025.68 "for 1956" and \$113,018.45 "for 1957."

as reduced to accord with taxes and assessments on other similar property of similar value shall be further reduced by the designated offsets described in clauses (1) and (2). The implication is clear from this that clause (1) and (2) payments and expenditures which may be offset in arriving at the net collectible tax for a particular year are those which were made in that year. Thus, payments and expenditures made in 1957, including annual amortization sums chargeable to that year, may be offset only against taxes levied in 1957 and payable in 1958.

It is therefore our opinion that since the designation in question did not allocate the clause (1) and (2) payments and expenditures as between tax years, it was error to use such designation as a basis for denying the county's 1958 tax claim against Moses Lake.

The fourth and final objection which the county makes to the Secretary's designation of offsets is that it includes a number of items which are not contemplated by Section 511. The items referred to are not contemplated by Section 511, the county argues, because they assertedly relate to facilities or services of a kind which are not actually or customarily provided by the State of Washington, Grant County, or other local taxing authorities with respect to other similar property.

The parties argue at great length the question of whether under clause (2) of Section 511 the expenditures which may be offset against taxes must be limited in the way contended for by Grant County. We find it unnecessary to decide this question, however, since in our view the expenditures which were designated were for facilities and services of a kind furnished by the State of Washington and Grant County.<sup>27</sup>

The county has set out in its brief parallel lists of facilities and services for which expenditures were designated and which the state and county provide with respect to non-Wherry Act property.<sup>28</sup> Not all of the items con-

<sup>27</sup>Since it is not necessary to decide this question, we are not called upon to consider the related contention of Moses Lake that the county may not in this action make a collateral attack upon the designation made by the Secretary. As we view it, the other deficiencies we have found in the designation with regard to inclusion of pre-June 15, 1956, payments and expenditures, and failure to segregate the offsets by tax years, do not manifest a collateral attack upon the designation but are arrived at only in considering the applicability of the designation to these taxpayers for the years in question.

<sup>28</sup>These lists are as follows:

The Secretary's determination of services provided by the United States:

- |                              |                    |
|------------------------------|--------------------|
| 1. Schools                   | 5. Sewer system    |
| 2. Streets, curbs, sidewalks | 6. Street lighting |
| 3. Street signs              | 7. Playground      |
| 4. Water system              |                    |

State and local taxes provide funds for

- |                                  |                          |
|----------------------------------|--------------------------|
| 1. Airport districts             | 10. Tuberculosis control |
| 2. Cemetery districts            | 11. Veterans' relief     |
| 3. Cities and towns              | 12. Ferry districts      |
| General government               | 13. Fire protection      |
| Accident fund                    | 14. Parks                |
| Pension funds                    | 15. Pest control         |
| Local Improvement guaranty funds | 16. Port districts       |
| Park funds                       | 17. Public utilities     |
| 4. Horticultural matters         | 18. Schools              |
| 5. Hospitals                     | 19. Sewers               |
| 6. Libraries                     | 20. Water                |
| 7. County roads                  | 21. Diking and drainage  |
| 8. Rodent control                | 22. Irrigation           |
| 9. Flood control                 | 23. Weed control         |

cerning which designated clause (2) expenditures were indicated have identical counterparts in the nomenclature of the other list. But each item of designated expense is sufficiently identifiable with one or more items of the list of state and county services so that it may be fairly concluded that the limitation suggested by the county has been adhered to.

We hold that the designation of clause (2) offsets here in question is not to be disregarded on the ground that it includes items of a kind not contemplated by Section 511.

This completes our review of the objections made by Grant County against applying the designated offsets against the county's claim made on the funds deposited for Moses Lake based on taxes payable in 1958. In summary, it would have been proper to partially or totally offset against the county's 1958 tax claim on the funds deposited for Moses Lake designated expenditures made in 1957, including annual amortization of capital expenditures. But since the designation contained no such year-by-year allocation, it was error to utilize it as a basis for disallowing this claim.

The county's claim against the funds deposited for Moses Lake based on taxes assertedly payable in 1959 was also denied, but not because of the Secretary's Section 511 designation. It was denied because the leasehold

passed into government ownership on March 1, 1958, pursuant to a declaration of taking. This was prior to the actual listing and assessment of the property for 1959 taxes, and hence prior to the time a lien could otherwise have attached to the property.

Since the county's claims are in rem, being directed against deposited funds, they cannot be sustained in the absence of a timely and valid lien. The trial court therefore correctly determined that the tax claim against Moses Lake for 1959 must be disallowed.

It follows from what is said above that the county's claim against the funds deposited for Moses Lake should have been allowed with regard to 1957 taxes as well as the 1955 and 1956 taxes, and was properly denied with regard to 1959 taxes. Concerning the claim based on Moses Lake taxes payable in 1958, the record in its present form does not warrant the disallowance ordered by the court.

A cause is not ordinarily remanded for the purpose of giving a party an opportunity to supply a deficiency in his evidence. Here, however, the deficiency results from a misunderstanding, apparently shared by the trial court, as to the meaning of Section 511, and from the fact that Moses Lake had to rely on a defective Secretary's designation for which the company was not responsible. Under these circumstances we believe that a remand is in order



to afford a reasonable opportunity to make the showing contemplated by Section 511.

We turn our attention now to the tax claims against Larsonaire for 1956, 1957, 1958, and against Larson Heights for 1957 and 1958.

Concerning the 1956 and 1957 taxes of Larsonaire and the 1957 taxes of Larson Heights, these respective properties could have been, but were not, listed and assessed prior to June 15, 1956. The assessor did not do so because he apparently assumed, not without warrant,<sup>29</sup> that in view of the Moses Lake injunction similar injunctions would have been obtained by Larsonaire and Larson Heights if he had attempted to take such action. Thus, no inchoate lien arose prior to June 15, 1956, with regard to Larsonaire's 1956 and 1957 taxes or Larson Height's 1957 taxes.

But county officials were not actually restrained by these two condemnees prior to June 15, 1956, from performing their statutory duty to list and value the Larsonaire and Larson Heights leaseholds. Larsonaire and Larson Heights, therefore, are not chargeable with the assessor's failure to

<sup>29</sup>On January 3, 1957, following the decision in *Offutt Housing Company v. County of Sarpy, supra*, the property of Larsonaire was assessed as "omitted property" for 1956 and 1957 taxes. At the same time the property of Larson Heights was similarly assessed for 1957 taxes. These two companies then obtained state court orders temporarily enjoining further tax proceedings until the remittitur should be handed down in the Moses Lake case then pending before the state supreme court for the second time.

act prior to that date. It follows that with respect to the tax years now being discussed, no encumbrance having attached prior to June 15, 1956, the limitations upon the collection of taxes prescribed by Section 511 must be given full application. There has never been any question but that the 1958 taxes levied against Larsonaire and Larson Heights are subject to Section 511.

Everything said above concerning the effect of Section 511 and the designation made thereunder upon the 1958 tax claim against Moses Lake applies with equal force to the 1956, 1957, and 1958 tax claims against Larsonaire and the 1957 and 1958 tax claims against Larson Heights. What has been said with regard to the county's claim against the funds deposited for Moses Lake based on taxes assertedly payable in 1959 is also applicable with regard to the county's 1959 tax claims against the funds deposited for Larsonaire and Larson Heights.

But one more contention remains to be discussed. At an early point in this opinion we dealt with the argument of Moses Lake that the personal property tax levies against that company were invalid under state law because the assessor did not list the property as a leasehold. We rejected the argument on the ground that the doctrine of *res judicata* precluded Moses Lake from raising that issue in this action.

This doctrine, however, does not preclude Larsonaire and Larson Heights from raising the same issue, since they were not parties to the state court action in which Moses Lake could have obtained an adjudication of the question. These two condemnees did not appeal from that part of the judgment herein which denied the tax claims asserted against them. They could not have appealed because they are not aggrieved by that judgment. They are nevertheless entitled to assert here in defense of that judgment a ground which would support it, even though it was a ground which the trial court rejected. We will assume that they have done so in view of the fact that they joined in the brief in which Moses Lake advanced this argument.

As stated above in discussing the similar contention of Moses Lake, the assessor in listing and assessing these properties used the form prescribed by the tax commission pursuant to RCW 84.40.050. He did not, however, list the properties under item 28 entitled "Leaseholds," but did so under item 27 entitled "Improvements upon land the fee of which is vested in the United States, the state, or any political subdivision thereof."

RCW 84.40.050 authorizing the tax commission to prescribe such forms was enacted in 1925.<sup>30</sup> Prior to this enactment the forms to be used in listing and assessing

<sup>30</sup>Laws Ex. Sess. 1925, chapter 130, § 23.

property were prescribed by statute. Rem. Comp. Stat., § 11137. (Laws Ex. Sess. 1925, chapter 130, § 54). Under that statute the assessor was required to list and value personal property under some thirty different classes as its character and situation might vary. While that statute was in effect a case arose in the courts of Washington in which the owner of certain property contended that the personal property tax was invalidly levied because the property fell within three classes specified in the statute, whereas it was listed and valued as if in reality it fell only within one class. *Southwark Foundry & Machine Co. v. Barham*, 126 Wash. 204, 217 Pac. 1021.

Rejecting this contention, the Washington Supreme Court said in that case:

"But we cannot conclude that this renders the assessment void. The statute is largely directory, and a substantial compliance therewith is sufficient to satisfy its directions. It is the policy of the law, so declared in the act itself, that all property subject to taxation shall be listed and assessed and it is of more importance that this part of the act be complied with than it is that it be listed under the specific designation the legislative form prescribes. Moreover, the appellant was in no manner injured by the error. If in the end it is required to pay a tax upon the property it claims, the tax will be no more nor no less than it would have been required to pay had the listing and valuation been made in the manner in which it contends it should have been made."

It seems to us that since the Washington Supreme Court

regarded the prior statute which prescribed the form of such lists as directory only it would so regard the form of lists prescribed by the tax commission under the later enacted RCW 84.40.050. The rationale of the Southwark decision therefore leads to hold that the listing of the Larsonaire and Larson Heights properties under an item not specifically labeled "leaseholds" did not invalidate the levying of taxes upon their Wherry Act project leaseholds for the years in question.

The county's claim against funds deposited for Larsonaire and Larson Heights based on 1959 taxes was properly denied. Concerning the county's claim against the funds deposited for Larsonaire based on 1956 through 1958 taxes and against the funds deposited for Larson Heights based on 1957 and 1958 taxes, the record in its present form does not warrant the disallowance ordered by the court. For the reasons indicated in discussing the disallowance of the claim against Moses Lake for 1958 taxes, we believe that a remand for further proceedings concerning these claims is appropriate.

The judgment is affirmed in part and reversed in part, as indicated herein. The causes is remanded to the trial court for further proceedings and the entry of a new judgment. In such judgment the claim of Grant County against the estimated compensation deposited for Moses Lake Homes, Inc., based on taxes levied against the lease-

hold payable in 1955, 1956, and 1957, shall be allowed in full. The claims of Grant County against the estimated compensation deposited for Moses Lake Homes, Inc., Earsonaire Homes, Inc., and Larson Heights, Inc., based on taxes assertedly levied against the respective leaseholds of these companies payable in 1959, shall be disallowed in full.

Further proceedings shall be had in the trial court on the claim of Grant County against estimated compensation deposited for Moses Lake Homes, Inc., based on taxes levied against that company payable in 1958; against estimated compensation deposited for Larsonaire Homes, Inc., based on taxes levied against that company payable in 1956, 1957, and 1958; and against estimated compensation deposited for Larson Heights, Inc., based on taxes levied against that company payable in 1957 and 1958.

In such further proceedings the respective taxpayers shall be given a reasonable opportunity (1) to offer evidence showing the extent to which the tax levied for each such year exceeds the tax payable in that year which Grant County levied, or would have levied, on other similar property of similar value; and (2) to obtain and offer in evidence a revised designation of offsets made pursuant to Section 511, in which offsetting payments and expenditures made in each year in which the taxes payable in 1956, 1957, and 1958 were levied, including sums reason-



ably attributable to annual amortization of capital expenditures, are separately stated. With respect to evidence, if any, submitted under (1) above, Grant County may produce counter evidence. The validity of any revised designation may be challenged on any ground not adjudicated on this appeal, subject to the question of whether such challenge is an impermissible collateral attack upon an administrative determination.

All of such evidence, if any, shall then be taken into account by the trial court in determining whether under Section 511 it is necessary to partially or wholly disallow the claims of Grant County to which reference is now being made. In the event no substantial evidence is offered by the named taxpayers with respect to any individual year in which such tax was levied, the full amount of the tax subsequently payable on the basis of such levy shall be allowed.

The parties shall bear their respective costs on this appeal and cross-appeal.

(Endorsed) Opinion Filed Jan. 25, 1960.

Frank H. Schmid, Clerk.

**APPENDIX B****SECTION 511 OF THE HOUSING ACT OF 1956**

69 Stat. 653; Title 42, U.S.C.A. 1954 note

"Notwithstanding the provisions of Section 401 of this Act (this section), the provisions of title VIII of the National Housing Act (Sections 1748-1748h of Title 12, Banks and Banking) in effect prior to the enactment of the Housing Amendments of 1955 (August 11, 1955) shall continue in full force and effect with respect to all mortgages insured pursuant to a certification by the Secretary of Defense or his designee made on or before June 30, 1955, and a commitment to insure issued on or before June 30, 1956 or pursuant to a certification by the Atomic Energy Commission or its designee made on or before June 30, 1956, except that the maximum dollar amount for each such mortgage shall be \$12,500,000. Nothing contained in the provisions of title VIII of the National Housing Act in effect prior to August 11, 1955 (Sections 1748-1748h of Title 12), or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by a mortgage insured under such provisions of title VIII; Provided, That, no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the

amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other services or facilities which are customarily provided by the State, county, city or other local taxing authority with respect to such other similar property; And provided further, That the provisions of this section shall not apply to properties leased pursuant to the provisions of Section 805 of the National Housing Act as amended on or after August 11, 1955 (Section 1748d of Title 12), which properties shall be exempt from State or local taxes or assessments."

## APPENDIX C

### SECTION 84.40.030, REVISED CODE OF WASHINGTON

"84.40.030 *Basis of valuation—Criterion of value—Growing crops excluded—Mines, quarries—Leaseholds.* All property shall be assessed at fifty percent of its true and fair value in money. In determining the true and fair value of property, the assessor shall not adopt a lower or different standard of value because it is to serve as a basis of taxation; nor shall he adopt as a criterion of value the price for which the property would sell at auction, or at a forced sale, or in the aggregate with all the property in the taxing district; but he shall value each article or description of property by itself, and at such price as he believes it to be fairly worth in money at the time the assessment is made.

"The true cash value of property shall be that value at which it would be taken in payment of a just debt from a solvent debtor.

"In assessing any tract or lot of real property, the value of the land, exclusive of improvements, shall be determined; also, the value of all improvements and structures thereon, and the aggregate value of the property, including all structures and other improvements, excluding the value of crops growing on cultivated lands and the growing stock of nurserymen.

"In valuing any real property on which there is a coal

or other mine, or stone or other quarry, the land shall be valued at such price as the land would sell for at a fair, voluntary sale for cash; any improvements thereon shall be separately valued and assessed as above provided; and any personal property connected therewith shall be listed, valued, and assessed separately as other personal property is assessed under general law.

*"Taxable leasehold estates shall be valued at such price as they would bring at a fair, voluntary sale for cash."*  
(Emphasis supplied)

## APPENDIX D

## SECTION 84.40.080, REVISED CODE OF WASHINGTON

"84.40.080. *Listing omitted property or improvements.*

The assessor, upon his own motion, or upon the application of any taxpayer, shall enter in the detail and assessment list of the current year any property shown to have been omitted from the assessment list of any preceding year, at the valuation of that year, or if not then valued, at such valuation as the assessor shall determine from the preceding year, and such valuation shall be stated in a separate line from the valuation of the current year. Where improvements have not been valued and assessed as a part of the real estate upon which the same may be located, as evidenced by the assessment rolls, they may be separately valued and assessed as omitted property under this section: *Provided*, That no such assessment shall be made for any period more than three years preceding the year in which such improvements are valued and assessed: *Provided, further*, That no such assessment shall be made in any case where a bona fide purchaser, encumbrancer, or contract buyer has acquired any interest in said property prior to the time such improvements are assessed. When such an omitted assessment is made, the taxes levied thereon may be paid within one year of the due date of the taxes for the year in which the assessment is made without penalty or interest."



**APPENDIX E****SECTION 84.60.030, REVISED CODE OF WASHINGTON**

*"84.60.030 Time of attachment of personalty tax lien.*

The taxes assessed upon each item of personal property assessed shall *be a lien upon such personal property from and after the date upon which it is listed with and valued by the county assessor*, and no sale or transfer of such property shall in any way affect the lien of such taxes thereon. The taxes assessed upon personal property shall be a lien upon each item of personal property of the person assessed, distrained by the treasurer as provided in RCW 84.56.070, 84.56.080, and 84.56.100, from and after the date of the distraint and no sale or transfer of such personal property so distrained shall in any way affect the lien of such taxes upon the property. The taxes assessed upon personal property shall be a lien upon the real property of the person assessed, selected by the county treasurer and designated and charged upon the tax rolls as provided in RCW 84.60.040, from and after the date of such selection and charge and no sale or transfer of the real property so selected and charged shall in any way affect the lien of such personal property taxes upon the property." (Emphasis supplied)

**FILE COPY**

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**FILED**

**DEC 22 1960**

**JAMES E. BROWNING, Clerk**

**No. 212**

**In the Supreme Court of the  
United States**

**OCTOBER TERM 1960**

**MOSES LAKE HOMES, INC., LARSONAIRE HOMES, INC.  
and LARSON HEIGHTS, INC.,**

*Petitioners,*

**vs.**

**GRANT COUNTY,**

*Respondent.*

**On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit**

**BRIEF FOR PETITIONERS**

**LYCETTE, DIAMOND & SYLVESTER  
AND LYLE L. IVERSEN**

*Attorneys for Petitioners*

**Office and Post Office Address:  
400 Hoge Building  
Seattle 4, Washington**

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**In the Supreme Court of the  
United States**

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OCTOBER TERM 1960

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MOSES LAKE HOMES, INC., LARSONAIRE HOMES, INC.,  
and LARSON HEIGHTS, INC.,

*Petitioners,*

vs,

GRANT COUNTY,

*Respondent.*

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On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

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**BRIEF FOR PETITIONERS**

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**OPINIONS BELOW**

The memorandum opinion of the trial court (Tr. 266 is not contained in official reports. The opinion of the Court of Appeals (R. ~~343-369~~) is reported at 264 F. (2d) 502. 341. 369.

**JURISDICTION**

The judgment of the Court of Appeals was entered on January 26, 1960 (R. 370) and thereafter 344.

a petition for rehearing was filed February 24, 1960 (R. 370) and an order denying petition for rehearing was entered May 17, 1960 (R. 371). Petition for Writ of Certiorari was docketed by this court on July 5, 1960. The writ was granted on October 9, 1960. The jurisdiction of this court is invoked under Title 28, United States Code, section 1254 (1).

### STATUTES INVOLVED

Statutes pertinent to the consideration of this case are section 511 of the Housing Act of 1956, 69 Stat. 653, Title 42, United States Code; Annotated section 1594, Note, which is set out in Appendix A hereto; section 84.40.030 of the Revised Code of Washington, particularly the last paragraph thereof, which statute is set out in Appendix B hereto; section 84.40.080 of the Revised Code of Washington which is set out in Appendix C hereto.

### QUESTION PRESENTED

Where petitioners held leaseholds from the federal government on housing projects on a military reservation which were taxed by a county of the State of Washington upon the full value of the physical improvements on the property leased pursuant to a decision of the highest court of the state as to the state tax laws with respect to such leases from the federal government; whereas, under the established law of the state all other leaseholds including those held from the state were taxed much lower, based upon the fair market value of the leasehold, considered in the light of its burdens and benefits; will a federal court enforce such a discriminatory tax against a deposit of estimated compensation in a condemnation of such leasehold?

### STATEMENT OF THE CASE

Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., respectively, were sponsors of Wherry Act housing projects on Larson Air Force Base in the State of Washington, pursuant to leases made to them by the Secretary of the Air Force under the Wherry Act, Title VIII of the National Housing Act, Title 5 USC 625 S-3 and Title 12 USC 1748 to 1748(h) (R. 99, 103, 140). The United States commenced condemnation proceedings to acquire the leasehold interests of the three corporations (R. 3) and a declaration of taking was entered on March 1, 1958 (R. 18).

At that time the United States paid into the Registry of the Court estimated compensation to the three corporations in the aggregate amount of \$253,000.00 (R. 26). Grant County, Washington, filed with the court an Assessment Lien and Statement (R. 72) and subsequently filed with the court a petition for order directing payment of money to it (R. 83), wherein it claimed to have certain lien rights for personal property taxes against the property for the years 1955 through 1959 and petitioned the court to have the estimated compensation on deposit paid to it on the basis of its claimed lien (R. 83). The three corporations also petitioned for payment of the estimated compensation to them. (R. 181).

The court tried the issue so made up, following which it entered its Findings of Fact and Conclusions of Law (R. 151) and a Judgment (R. 150), whereby claims of Grant County against the estimated compensation were denied except as to its claim against Moses Lake Homes, Inc., which was allowed for 1955 taxes and for 1956 taxes.

Appeal and cross-appeal were taken pursuant to Rule 54b of the Rules of Civil Procedure to the Ninth Circuit Court of Appeals by the respective parties, which reversed in part and affirmed in part the judgment of the lower court and remanded the cause to the District Court for further proceedings (R. 340). It is that judgment which we seek to have reviewed.

The three corporations held leases from the Government under which they were to erect, maintain and operate on a military reservation a housing project for a period of seventy-five years, unless sooner terminated by the Government (R. 103). The project was to be financed by an FHA insured loan (R. 106) and the housing units were to be leased to military and civilian personnel assigned by the military commander (R. 107). The lease, in paragraph 11 (R. 103), provided that buildings as soon as erected were to become the property of the Federal Government (R. 113).

The Assessor of Grant County in June, 1954 listed the physical improvements placed upon the military reservation by one of the corporations, Moses Lake Homes, Inc., upon his "Detail and Assessment List" for 1955 taxes (R. 152). Thereafter, in July of 1954 Grant County was restrained by the Superior Court of the State of Washington from levying or attempting to levy taxes against the property of Moses Lake Homes, Inc., and the restraining order remained in effect until December, 1957 when the Supreme Court of the State of Washington, in *Moses Lake Homes, Inc. v. Grant County*, 51 Wn. (2d) 285, 317 P. (2d) 1069, set the injunction aside and held that plaintiff Moses Lake

Homes, Inc.'s leasehold was taxable at the valuation of the physical improvements (R. 154).

During the time that the injunction was outstanding the officials of Grant County took no action to list or assess the property of Larsonaire Homes, Inc. or Larson Heights, Inc., although they were not restrained from doing so. Also, no further assessment of the property of Moses Lake Homes, Inc. was attempted during that period, but after the Moses Lake Homes, Inc. injunction was lifted in 1957 the County taxing officials for the first time listed on the tax rolls the property of Larsonaire Homes, Inc. and Larson Heights, Inc. for any years, and listed for the first time the property of Moses Lake Homes, Inc. for years subsequent to 1955. This listing was accomplished pursuant to the Washington omitted property statute, section 84.40.080, Revised Code of Washington, (Appendix C hereto) which provides in its essential parts:

"The Assessor . . . shall enter in the detail and assessment list of the current year any property shown to have been omitted from the assessment list of any preceding year at the valuation of that year, or if not then valued, at such valuation as the assessor shall determine from the preceding year . . .

. . . When such an omitted assessment is made, the taxes levied thereon may be paid within one year of the due date of the taxes for the year in which the assessment is made without penalty or interest."

Prior to 1957 no actual levy whereby the amount of the taxes was ascertained had been made (R. 153). All of the taxes thus became payable for the first time in 1957.

Congress, by section 511 of the Housing Act of 1956 (Appendix B infra) prescribed that taxes

might be levied against the interests of Wherry Act leaseholders,

" \* \* \* Provided, That no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to \* \* \* "

certain payments made by the federal government or the lessee.

Both the trial court and the circuit court of appeals herein have found that these Wherry Act lessees were taxed upon their leaseholds upon a *different and higher basis* than taxes are assessed against other similar property of similar value. (R. 155, R. 355).

By a Washington statute, section 84.40.030 of the Revised Code of Washington (Appendix C *infra*) it is provided:

"Taxable leasehold estates shall be valued at such price as they would bring at a fair, voluntary sale for cash."

The Washington Supreme Court has applied this statute to all non-Wherry Act leaseholds and has held with respect to leaseholds held from the State of Washington, and with respect to all leaseholds other than federal Wherry Act housing project leaseholds, that in valuing the leaseholds for taxation purposes they must be measured by their *market value* considered in the light of their burdens and benefits. *Metropolitan Building Co. v. King County*, 72 Wash. 47, 129 Pac. 883; *Metropolitan Building Co. v. King County*, 62 Wash. 409, 113 Pac. 1114; *Metropolitan Bldg. Co. v. King County*, 64 Wash. 615, 117 Pac. 495; *In re Metropolitan Build-*



ing Co., 144 Wash. 469, 258 Pac. 473 (R. 155).

The State of Washington has followed a different method of evaluating Wherry Act housing projects for taxation purposes by the decision of its Supreme Court in the case of *Moses Lake Homes, Inc. v. Grant County*, 51 Wn. (2d) 285, 317 P. (2d) 1069, whereby the Supreme Court of Washington held that with respect to Wherry housing project leases, the value of the leasehold interest is the full value of the buildings and the improvements (R. 155). The Circuit Court of Appeals (R. 355) held the finding of the trial court (R. 155) to be correct where the trial court stated:

"By the laws of the State of Washington, as declared by its Supreme Court, taxes and assessments on Wherry housing projects are thus levied upon a basis different and higher than the amount of taxes and assessments on other similar property of similar value."

The Circuit Court said (R. 355):

"The trial court's further finding that a different method was used in valuing the Wherry Act project leaseholds here in question is also correct. Likewise to be sustained is the court's finding that the method used in assessing the Moses Lake leaseholds resulted in a higher tax than would have been true in the case of a non-Wherry Act leasehold."

The Circuit Court, however, proceeded to hold that the failure to tax upon the same basis as other similar property is taxed did not invalidate the tax, but only required that the amount deductible be reduced to what it would have been had the tax been levied upon a non-Wherry Act leasehold basis (R. 355). The court there said:

"Under Section 511, however, the fact that the taxes are higher does not invalidate the entire tax. It only requires that the amount

collectible, be reduced to what it would have been had the tax been levied on a non-Wherry Act leasehold basis."

The court held that those taxes on Moses Lake Homes, Inc. which, except for the injunction, would have been assessed and levied prior to June 15, 1956 (the date mentioned in Section 511 of the Housing Act of 1956 [Appendix A infra] ) were collectible in full (R. 353, 354).

The Secretary of the Air Force through his authorized representative, under date of 4 September, 1957, made a determination of the credits to be allowed against the taxes, pursuant to Section 511 of the Housing Act of 1956 (Appendix A infra) which determination appears in Record 125.

Grant County in attempting the taxation did not take into account that determination (See Request for Admission 12, R. 102, and answer thereto, R. 141). The Assessor of Grant County, in fixing the assessed values of the properties, based his valuation upon the market value of the physical improvements on the respective property held by respective plaintiffs, without reference to the market value of the leaseholds of the respective plaintiffs and without reference to mortgages and encumbrances against leaseholds (R. 102, 141). The leaseholds were heavily encumbered by mortgages (R. 355, footnote).

The statutes of Washington make no provision for allowing any credits against taxes as contemplated by section 511 of the Housing Act of 1956.

The Circuit Court has ordered the cause remanded to the District Court to enter judgment against Moses Lake Homes, Inc. for 1955, 1956 and 1957 taxes and for further proceedings to determine the amount of other taxes to become due, based

upon assessments on the same basis as other similar property is assessed, and after allowing proper credits for the amounts to be redetermined by the Secretary of the Air Force, pursuant to section 511 of the Housing Act of 1956 (R. 368).

### SUMMARY OF ARGUMENT

The taxes which Grant County seeks to have the federal court enforce are inherently illegal under federal law because they discriminate against leases from the federal government by imposing taxation at a different and higher rate from that which is imposed upon similar leases from the state or from private individuals. The law of the State of Washington as construed by its highest court is repugnant to basic principles of our federal system and are so contrary to federal law that the assistance of federal courts in their enforcement should be denied.

### ARGUMENT

#### A. The Taxes Discriminated Against Federal Leases.

Both the trial court and the Circuit Court of Appeals have found in this case that the tax which Grant County seeks to enforce in this action is discriminatory against these federal leases. The trial court in paragraph IV, (R. 155) of the findings of fact dealt specifically with the matter of discrimination and found as follows:

"The State of Washington by statute, section 84.40.030 of the Revised Code of Washington provides that taxable leasehold estates shall be valued at such price as they would bring at a fair, voluntary sale for cash. The Supreme Court of the State of Washington has held that with respect to leaseholds other than Wherry

Housing project leaseholds that in valuing the leasehold for taxation purposes it must be measured by its market value, considered in the light of its burdens and benefits. *Metropolitan Building Co. v. King County*, 72 Wash. 47, 192 Pac. 883; *Metropolitan Building Co. v. King County*, 62 Wash. 409, 113 Pac. 1114; *In re Metropolitan Building Co.*, 144 Wash. 469, 258 Pac. 473. The State of Washington has followed a different method of evaluating Wherry Housing projects for taxation purposes by decision of its Supreme Court. In the case of *Moses Lake Homes v. Grant County*, 151 Wash. Dec. 254 (51 Wn (2d) 285, 317 P. (2d) 1069) whereby the Supreme Court held that with respect to Wherry Housing project leases, the value of the leasehold interest is the full value of the buildings and improvements. By the laws of the State of Washington as declared by its Supreme Court, taxes and assessments on Wherry Housing projects are thus levied upon a basis different and higher than the amount of taxes and assessments on other similar property of similar value."

The Circuit Court of Appeals said (R. 355):

"The trial court's further finding that a different method was used to evaluate the Wherry Act project leaseholds here in question is also correct. Likewise to be sustained is the court's finding that the method used in assessing the Moses Lake leaseholds resulted in a higher tax than would have been true in the case of a non-Wherry Act leasehold."

The law of the State of Washington is well-settled in a long series of cases involving leases from the State of Washington to the effect that such leaseholds from the state must be measured by the market value of the leasehold considered in the light of its burdens and benefits. Thus, in *Metropolitan Building Co. v. King County*, 72 Wash.

47, 129 Pac. 883, which involved a fifty-year lease from the State of Washington on property on which the lessee erected buildings which became the property of the lessor, much as in the present case, the Washington Supreme Court stated the principle as follows:

"As we have stated, the state owns both the fee and the improvements subject only to the right of user in the respondent. The leasehold is burdened by a debt exceeding the value placed upon the lease by most of the witnesses. A purchaser of the lease would necessarily stand in the shoes of the respondent. He would take what it has with all its burdens, no more and no less. We had supposed that the former appeals fixed the standard of estimating the value. In the first appeal, we said that the value of the leasehold interest is its actual value in money on the date of the assessment, and

"The value of the term is fixed with reference to present as well as prospective conditions; not speculative, but actual; or, to state the proposition more aptly, its value in money to one who desires to sell but who is under no necessity of selling, and to one who is desirous of buying but is under no compulsion to do so."

" \* \* \* We say here, as we have said before, that the value of the leasehold interest is to be measured both by its burdens and its benefits. It cannot be otherwise. A purchaser would necessarily take it *cum onere*."

In this case the state, instead of following the method used in taxing similar leaseholds from the state disregarded the burdens against the property in the form of mortgages and took no cognizance of the salability of the leasehold estate but simply levied the tax upon the full value of the physical property itself.



The impact upon the facts of this case was well stated by the Circuit Court of Appeals in footnote No. 18, (R. 355) where the court said:

"The Moses Lake leasehold was heavily encumbered by a mortgage. The amortization of this indebtedness was not taken into account in assessing the leasehold as only the value of the physical improvements was considered. But had the valuation of the leasehold been measured by its market value considered in the light of its burdens and benefits, the necessity of amortizing the mortgage would have been taken into account. See *In re Assessment of Metropolitan Building Co.*, 144 Wash. 469, 258 Pac. 473, 476. Had it been taken into account, the assessed value for 1958 and therefore the levied tax would have been substantially lower, though we do not know how much lower."

It is apparent that the taxes sought to be enforced against the estimated compensation in this condemnation proceeding were thus discriminatory as compared to the taxes that would have been levied against any other comparable type of property.

**B. State Taxes Which Discriminate Against Federal Contractors Violate the Federal Law.**

This court has recently had occasion to recognize and apply the principle that state taxes may not discriminate against the government nor those with whom it deals. In *Phillips Chemical Co. v. Dumas Independent School District*, 361 U. S. 376, 4 Law Ed. (2d) 384, this court directly held that a state tax is invalid where it undertakes to levy a tax against the lessee from the federal government on a basis which discriminates against the lessee in a manner that it would not do if the lease were held from the state. This court there said:



"As we had occasion to state quite recently, it still remains true as it has from the time of *McCulloch v. Maryland*, 4 Wheat. 316, that a state tax may not discriminate against the Government or those with whom it deals. See *U. S. v. City of Detroit*, *supra*, 473. Therefore, this tax may not be exacted."

This court early adopted the principle that a state may not constitutionally levy taxes on those dealing with the federal government except on a non-discriminatory basis. In *McCulloch v. Maryland*, 4 Wheat. 316, 4 Law Ed. 579, this court said:

"The opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank in common with the other real property within the state, nor to a tax imposed on the interests which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the state."

Throughout the years this court has reiterated the proposition that taxation by states of those who deal with the federal government must be non-discriminatory. For example, see *Miller vs. Milwaukee*, 272 U. S. 713, 47 Sup. Ct. 280, 71 Law Ed. 487; *Graves v. New York ex rel O'Keefe*, 306 U. S. 466, 59 Sup. Ct. 595, 83 Law Ed. 927; *Alabama v. King and Boozer*, 314 U. S. 1, 62 Sup. Ct. 43, 86 Law Ed. 3; *Smith v. Davis*, 323 U. S. 11, 65 Sup. Ct. 157, 89 Law Ed. 107; *James v. Dravo Contracting Company*, 302 U. S. 134, 58 Sup. Ct. 208, 82 Law Ed. 155; *Buckstaff Bathhouse Company v. McKinley*, 308 U. S. 358, 60 Sup. Ct. 279, 84 Law Ed. 322; *Oklahoma Tax Commission v. Texas Company*, 336 U. S. 342, 69 Sup. Ct. 561, 93 Law Ed. 721; *Helvering v. Gerhardt*, 304 U. S. 405, 58 Sup. Ct. 969, 82 Law Ed. 1427.

There is no dissent from the proposition that a state in taxing the property of an individual may not pick his property out for special adverse treatment because it is put to a federal use. That is exactly what the effect of the Washington law is where it taxes Wherry Act leaseholds alone, of all leaseholds in the state, on a different and higher basis.

**C. Federal Courts Should Not Lend Their Power to Enforce State Taxation Discriminatory Against the Federal Government.**

A cornerstone of our constitutional system is the right of the federal government and those with whom it deals to be free from coercion or discrimination by the states; indeed, such right is essential to the existence and functioning of the federal government as this court has recognized in the case of *Phillips Chemical Co. v. Dumas Independent School District*, 361, U.S. 376, 4 Law Ed. (2d) 384, and other cases above cited.

We are concerned here with an application by a political subdivision of the State of Washington to a federal court to enforce against funds deposited by the federal government in the federal court, in a condemnation proceeding, a plainly discriminatory tax. Courts do not lend their assistance to carry out that which offends against the law or the public policy of the sovereignty to which they owe their existence. This court in the case of *Bank of the U. S. v. Owens*, 2 Peters 527, 7 Law Ed. 508, said:

"Courts are instituted to carry into effect the laws of the country; how can they then become auxiliary to the consummation of violation of law?"

"There can be no civil right where there can be no legal remedy and there can be no legal remedy for that which is itself illegal."

The Circuit Court of Appeals while finding these taxes to be discriminatory, nevertheless undertook to enforce them for the years 1955, 1956 and 1957 (R. 368); which result was based largely upon the contention that the matter was concluded by the decision of the Supreme Court of Washington in the case of *Moses Lake Homes, Inc. v. Grant County*, 51 Wn. (2d) 285, 317 P. (2d) 1069 (R. 349). The court was wrong in so holding.

The first time that a federal court had been called upon to apply the discriminatory Washington law was in this case involving the condemnation of the leaseholds. The Washington Supreme Court case above referred to did not involve a judgment for any taxes in any actual amounts. Indeed none had been levied at the time of the decision (R. 345). The decision of the Washington Supreme Court in the case of *Moses Lake Homes, Inc. v. Grant County*, 51 Wn. (2d) 285, 317 P. (2d) 1069, is conclusive, only to the extent of what it held and that is that under the laws of the State of Washington the value of the leasehold interest of Moses Lake Homes, Inc. is the full value of the buildings and improvements. Insofar as this is a construction of the law of the State of Washington, that decision is controlling.

The decision did not undertake to deal with the question of whether it would result in treating these federal leases differently from other leaseholds. It did not discuss or consider whether the law as so construed would have the effect of taxing leases from the federal government at a higher rate than similar leases from the state. The Washington Supreme Court in arriving at its decision, rather

blindly followed what it conceived to be the result of a decision of this court, but in so doing made no comparison of the result with the method by which it had said all other leaseholds are to be taxed by the State of Washington.

While state courts have supreme power to interpret the written and unwritten laws of the state, *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 74 Law Ed. 1107, the federal courts are not bound by state court decisions concerning questions arising under the federal Constitution.

" \* \* \* Even the decisions of the highest state courts are not binding upon the federal courts concerning questions arising out of the Constitution of the United States. The United States Courts are the peculiar guardians of the Constitution of the United States." *Howard v. Cordner*, 116 F. Supp. 783.

In this case the highest court of the State of Washington established conclusively the law of the State of Washington to be that the State of Washington would discriminate against sponsors of Wherry Act Housing projects. This is strictly a construction of state law. The Washington Court did not purport to construe any federal statute and did not discuss or purport to construe any federal constitutional principle that is here involved. As the court stated in its opinion, the matter before it was the determination of the nature of the interest of the taxpayer and the manner of evaluating the property. The decision of the State Supreme Court was the act of the State of Washington and established the law of the state. The federal courts were not bound by its legal implications insofar as they resulted in discriminatory treatment of federal leases.

This was not a matter which was *appealable* to the United States Supreme Court. Vol. 30A, American Jurisprudence, page 386, section 344, states:

"It has been held that a determination of a federal constitutional question by a state tribunal is not conclusive if there is no right of appeal on the federal question from the highest court of the state to the United States Supreme Court."

Citing *Garland Co. v. Filmer*, 1 F. Sup. 8.

The right of appeal from a state supreme court decision to this court is strictly statutory. The statute is Section 1257, of Title 28, U.S.C. That section reads:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

It will be noted that appeal can be had only where there is drawn into question the validity of a treaty



or statute of the United States and the decision is against its validity, or where there is drawn into question the validity of a state statute as being repugnant to the constitution, treaties or laws of the United States and the decision is in favor of its validity. In this case there was no decision against the validity of a federal statute nor was there any state *statute* discussed in the opinion. The validity of a state statute was not one of the issues mentioned by the court. This was strictly a matter of *judge-made law* where the court in the case of *Moses Lake Homes, Inc. v. Grant County*, 51 Wn. (2d) 285, 317 P. (2d) 1069, undertook to declare the method of taxing a sponsor of a Wherry Act housing project. No statutes or treaties of any kind whatsoever were discussed, sustained or invalidated by the opinion. The decision of the Washington State Supreme Court clearly did not come within the letter of the statute permitting *appeals* to this court. 36 C.J.S., sec. 238 points out:

"The statutory grant of appellate jurisdiction to the United States Supreme Court will be strictly construed."

It is quite clear that there was no appeal to this court as a matter of right from the decision of the Washington Supreme Court.

Subsection 3 of Section 1257, Title 28, U. S. C., provides that review may be had by Writ of Certiorari where any:

" \* \* \* title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under the United States."

This is not a review as a matter of right to a petitioner. That section is limited by the constructions



that have been placed upon it and again would not make access to this court available from the decision of the Washington Court above referred to. First of all, such a privilege is one that this court could grant or deny at its pleasure. More important, however, is the fact that under the rules which this court has announced for assuming to review a state court decision, this is not a matter which it would have entertained. One of the cardinal principles for reviewing a state court decision is that only federal questions *discussed in the state court decision* will be reviewed by this court. Thus, in *Northwestern Bell Telephone Co. v. Nebraska State Railway Commission*, 297 U. S. 471, 80 L. Ed. 810, the court refused to pass upon contentions made as to disregard by a state court of federal rights saying:

"Its opinion discusses only the first two contentions made here and we accordingly confine our review to them. See *Miedreich v. Allenstein*, 232 U. S. 236, 58 L. Ed. 584; *Cissna v. Tennessee*, 246 U. S. 289, 62 L. Ed. 720; *Saltonstal v. Saltonstal*, 276 U. S. 260, 72 L. Ed. 565."

To the same effect see *Cox vs. Texas*, 202 U. S. 446, 50 L. Ed. 1099. This court has consistently held that it will not review state court decisions as to questions not passed upon by the state court in its decision. *State Farm Mutual Insurance Co. v. Duell*, 324 U. S. 154, 89 L. Ed. 812. The federal question must not only have been raised in the state court but it must have been decided within the state court. *Matheson v. Branch Bank of Alabama*, 48 U. S. 260, 12 L. Ed. 692; *Wilson v. Cook*, 327 U. S. 474, 90 L. Ed. 793; *Mellon v. O'Neil*, 275 U. S. 212, 72 L. Ed. 245; *Seaboard Airline Railway v. Duvall*, 225 U. S. 477, 56 L. Ed. 1171; *Appleby v. Buffalo*,

221 U. S. 524, 55 L. Ed. 838; *Matthews v. Huwe*, 269 U. S. 262, 70 L. Ed. 266.

In the present case nothing appears in the decision of the state court to show that any federal question was ever considered or passed upon. Thus, under the precedents of this court, not even certiorari would have been available to review the question of the federal acceptability of the state law.

Prior to the present case there has never been an opportunity to present to a federal court the federal questions here involved. The federal courts are not obligated to enforce a constitutionally objectionable state tax. These taxpayers have never had the federal question of discrimination passed upon except insofar as the trial court and the Circuit Court of Appeals applied Section 511 of the Housing Amendments of 1955, (69 Stat. 653, Title 42, United States Code annotated, 1594, Note, Appendix A, *infra*), to taxes for periods subsequent to its effective date. That statute specified that

“ \* \* \* No such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value \* \* \* ”

Where the trial court and the Circuit Court of Appeals applied that section, they both found the taxes to be invalid. Actually, that portion of section 511 was but declaratory of the principles of constitutional law already existing and the Circuit Court of Appeals was wrong in not applying it as well to the discriminatory taxes for periods prior to the effective date of section 511.

When the county came into a federal court and sought to have those taxes tainted with discrimin-

ation enforced by the authority of the federal court, the situation was comparable to that which arises whenever one comes into a court and seeks to invoke the court's authority to enforce anything illegal. In principle, it is similar to the numerous cases where efforts have been made to have the courts secure to a party the benefits of an illegal contract. In such cases the courts are unanimous in saying that it is the duty of the court even if the parties do not raise the question to refuse to lend its assistance in carrying out that which is illegal. Thus, in *Schur v. Johnson* (Calif. Appeals) 38 P. (2d) 844 which was an action against a state to recover sales tax on the ground that the transaction was actually a gaming pay-off, rather than a sale the California Appeals Court said:

"Even if the parties to the suit do not raise the question of the illegality of the transaction upon which the suit is founded, it is the duty of the court to do so on its own motion when the acts upon which the plaintiff relies appear to be in violation of the law."

The courts simply will not lend their assistance to carry out that which is illegal. Thus, this court in *Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U. S. 396, 32 L. Ed. 979, said:

"The law cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids nor can it give effect to any agreement, the making whereof was an act violating law. So that in short all stipulations to overturn—or an evasion of—what the law has established; all promises interfering with the working of the machinery of the government in any of its departments or obstructing its officers in their official acts, or corrupting them; all detrimental to public order and public good in such manner and degree as

the decisions of the courts have defined, all made to promote what a statute has declared to be wrong are void—. The distinction between malum in se and malum prohibitum has long since been exploded and as 'there can be no civil right where there can be no legal remedy and there can be no legal remedy for that which is itself illegal', *Bank of U. S. v. Owens*, 27 U. S. 2, it is clear that contracts in direct violation of statutes expressly forbidding their execution cannot be enforced \* \* \* "

The logic of the foregoing while there applied to an illegal contract is just as applicable to an illegal tax. In *McMullen v. Hoffman*, 174, U. S. 639, 43 L. Ed. 1117, this court held that a federal court should not assist one who had made a contract that was against federal policy. The court said:

"We must therefore come back to the proposition that to permit a recovery in this case is in substance to enforce an illegal contract and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract."

The duty of the court in this case when the illegality of the very claim which is sought to be enforced becomes apparent was well stated by the Supreme Court of Kansas in *Patterson v. Imperial Window Glass Co.*, 137 Pac. 935:

"When in any stage of the proceedings it was established to the satisfaction of the court that the cause of action upon which the plaintiffs sought to recover arose out of a transaction in violation of the antitrust laws it became at once the duty of the court to refuse to aid either party to profit by the iniquitous agreement."

The court went on to say:

"In *Coppell v. Hall*, 74 U. S. 542, 558, 19 L. Ed. 244, it was said: 'Whenever the illegality

appears whether the evidence comes from one side or the other, the disclosure is fatal to the case..No consent of the defendant can neutralize its effect - - .The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation'."

Thus, in this case a federal court is called upon to enforce a tax which violated fundamental constitutional principles. As soon as that fact came to the attention of the court, it should have declined to lend its assistance to its enforcement.

The error in failing to take into consideration the constitutional principle is a rather fundamental one and the rule is well established that matters which are fundamental may be considered by an appellate court in the interest of justice at any time, *Kansas City Southern Railroad Co. v. Guaranty Trust Co.*, 240 U. S. 166, 60 L. Ed. 579; The lower court in this case committed legal error in disregarding the principle that a state tax may not be enforced if it discriminates against a federal lease and it is open to this court to consider that legal error. *Weems v. U. S.*, 217 U. S. 349, 54 L. Ed. 793; *Kryger v. Wilson* 242 U.S. 171, 61 L. Ed. 299; *Clyatt v. U. S.*, 197 U. S. 207, 49 L. Ed. 727; *Wilborg v. U. S.*, 163 U. S. 692, 41 L. Ed. 289.

This question affects the public interest of the United States and the federal court should not be a party to a discrimination against the United States in the tax field.

### CONCLUSION

The taxes sought to be collected through the agency of the federal court in this case were inherently illegal because of the discrimination. That

question of the discrimination against the lessees from the federal government has never been passed upon by any court previous to the present litigation. The disposition of this case by this court should be similar to the disposition which this court made in the comparable case of *Phillips Chemical Co. vs. Dumas Independent School District*, 361 U. S. 376, 4 L. Ed. (2d) 384, where the courts simply concluded:

"Therefore this tax may not be exacted." The federal courts should deny their assistance in the collection of the discriminatory taxes whether they accrued before or subsequent to the effective date of Section 511 of the Housing Amendments of 1956 (42 U.S.C.A. 1954 Note).

*Respectfully submitted,*

LYCETTE, DIAMOND & SYLVESTER  
AND LYLE L. IVERSEN

*Attorneys for Petitioners*



## APPENDIX A

Section 511 of The Housing Act of 1956, 69 Stat.  
653; Title 42, U. S. C. A. 1594 note

"Notwithstanding the provisions of Section 401 of this Act (this section), the provisions of title VIII of the National Housing Act (Section 1748-1748h of Title 12, Banks and Banking) in effect prior to the enactment of the Housing Amendments of 1955 (August 11, 1955) shall continue in full force and effect with respect to all mortgages insured pursuant to a certification by the Secretary of Defense or his designee made on or before June 30, 1955, and a commitment to insure issued on or before June 30, 1956 or pursuant to a certification by the Atomic Energy Commission or its designee made on or before June 30, 1956, except that the maximum dollar amount for each such mortgage shall be \$12,500,000. Nothing contained in the provisions of title VIII of the National Housing Act in effect prior to August 11, 1955 (Sections 1748-1748h of Title 12), or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by a mortgage insured under such provisions of title VIII; Provided, That, no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public

agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other services or facilities which are customarily provided by the State, county, city or other local taxing authority with respect to such other similar property; And provided further, That the provisions of this section shall not apply to properties leased pursuant to the provisions of Section 805 of the National Housing Act as amended on or before August 11, 1955 (Section 1748d of Title 12), which properties shall be exempt from State or local taxes or assessments."

## APPENDIX B

## Section 84.40.030, Revised Code of Washington

**"84.40.030 Basis of valuation—Criterion of value—Growing crops excluded—Mines, quarries—Leaseholds.** All property shall be assessed at fifty per cent of its true and fair value in money. In determining the true and fair value of property, the assessor shall not adopt a lower or different standard of value because it is to serve as a basis of taxation; nor shall he adopt as a criterion of value the price for which the property would sell at auction, or at a forced sale, or in the aggregate with all the property in the taxing district; but he shall value each article or description of property by itself, and at such price as he believes it to be fairly worth in money at the time the assessment is made.

• "The true cash value of property shall be that value at which it would be taken in payment of a just debt from a solvent debtor.

"In assessing any tract or lot of real property, the value of the land, exclusive of improvements, shall be determined; also, the value of all improvements and structures hereon, and the aggregate value of the property, including all structures and other improvements, excluding the value of crops growing on cultivated lands and the growing stock of nurserymen.

"In valuing any real property on which there is a coal or other mine, or stone or other quarry, the land shall be valued at such price as the land would sell for at a fair, voluntary sale for cash; any improvements thereon shall be separately valued and assessed as above provided; and any personal property connected therewith shall be listed, valued, and

4A

assessed separately as other personal property is assessed under general law.

*"Taxable leasehold estates shall be valued at such price as they would bring at a fair, voluntary sale for cash."* (Emphasis supplied)

## APPENDIX C

## Section 84.40.080, Revised Code of Washington

**"84.40.080** *Listing omitted property or improvements.* The assessor, upon his own motion, or upon the application of any taxpayer, shall enter in the detail and assessment list of the current year any property shown to have been omitted from the assessment list of any preceding year, at the valuation of that year, or if not then valued, at such valuation as the assessor shall determine from the preceding year, and such valuation shall be stated in a separate line from the valuation of the current year. Where improvements have not been valued and assessed as a part of the real estate upon which the same may be located, as evidenced by the assessment rolls, they may be separately valued and assessed as omitted property under this section: *Provided*, That no such assessment shall be made for any period more than three years preceding the year in which such improvements are valued and assessed: *Provided, further*, That no such assessment shall be made in any case where a bona fide purchaser, encumbrancer, or contract buyer has acquired any interest in said property prior to the time such improvements are assessed. When such an omitted assessment is made, the taxes levied thereon may be paid within one year of the due date of the taxes for the year in which the assessment is made without penalty or interest."

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JAMES E. BROWNING, Clerk

No. 212

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**In the Supreme Court of the United States**

OCTOBER TERM, 1960

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MOSES LAKE HOMES, INC., LARSONAIRE HOMES, INC.,  
AND LARSON HEIGHTS, INC., PETITIONERS

v.

GRANT COUNTY

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

---

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

---

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT**

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

---

**OPINIONS BELOW**

The opinion (oral) of the District Court (R. 266) is unreported. The opinion of the Court of Appeals (R. 341-369) is reported at 276 F. 2d 836.

**JURISDICTION**

The judgment of the Court of Appeals was entered on January 25, 1960. (R. 369.) A timely petition for rehearing was denied on May 17, 1960. (R. 370.) The petition for writ of certiorari was filed on July 5, 1960, and was granted "limited to Question No. 3" on October 10, 1960, 364 U.S. 814. (R. 370.) The Solicitor General was invited to file a brief setting forth the views

of the United States. (R. 371.) The jurisdiction of this Court rests upon 28 U.S.C., Section 1254(1).

**QUESTION PRESENTED**

May a state tax which discriminates against persons holding leaseholds from the United States be enforced in a United States court against a deposit of estimated compensation in a condemnation of such leaseholds?

**STATUTES INVOLVED**

Housing Amendments of 1955, c. 783, 69 Stat. 635:

SEC. 408 [as amended by Sec. 511, Housing Act of 1956, c. 1029, 70 Stat. 1091]. Notwithstanding the provisions of section 401 of this Act, the provisions of title VIII of the National Housing Act in effect prior to the enactment of the Housing Amendments of 1955 shall continue in full force and effect with respect to all mortgages insured pursuant to a certification by the Secretary of Defense or his designee made on or before June 30, 1955, and a commitment to insure issued on or before June 30, 1956, or pursuant to a certification by the Atomic Energy Commission or its designee made on or before June 30, 1956, except that the maximum dollar amount for each such mortgage shall be \$12,500,000. Nothing contained in the provisions of title VIII of the National Housing Act in effect prior to August 11, 1955, or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by a mortgage insured under such provisions of title VIII:

*Provided, That* no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other local services or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to such other similar property: *And provided further*, That the provisions of this section shall not apply to properties leased pursuant to the provisions of section 805 of the National Housing Act as amended on or after August 11, 1955, which properties shall be exempt from State or local taxes or assessments.

(42 U.S.C. 1958 ed., Sec. 1594, note.)

7 Revised Code of Washington:

84.40.030 *Basis of valuation—Criterion of value—Growing crops excluded—Mines, quarries—Leaseholds.* All property shall be assessed at fifty percent of its true and fair value in money. In determining the true and fair value of property, the assessor shall not adopt a lower or different standard of value because it is to serve as a basis of taxation; nor shall



he adopt as a criterion of value the price for which the property would sell at auction, or at a forced sale, or in the aggregate with all the property in the taxing district; but he shall value each article or description of property by itself, and at such price as he believes it to be fairly worth in money at the time the assessment is made.

The true cash value of property shall be that value at which it would be taken in payment of a just debt from a solvent debtor.

In assessing any tract or lot of real property, the value of the land, exclusive of improvements, shall be determined; also, the value of all improvements and structures thereon, and the aggregate value of the property, including all structures and other improvements, excluding the value of crops growing on cultivated lands and the growing stock of nurseries.

In valuing any real property on which there is a coal or other mine, or stone or other quarry, the land shall be valued at such price as the land would sell for at a fair, voluntary sale for cash; any improvements thereon shall be separately valued and assessed as above provided; and any personal property connected therewith shall be listed, valued, and assessed separately as other personal property is assessed under general law.

Taxable leasehold estates shall be valued at such price as they would bring at a fair, voluntary sale for cash. [(i) 1939 c. 206 § 15; 1925 ex. s.c. 130 § 52; RRS § 11135. (ii) 1939 c. 116

§ 1, part; 1925 ex. s.c. 130 § 25; RRS § 11129, part.]

84.40.080 *Listing omitted property or improvements.* The assessor, upon his own motion, or upon the application of any taxpayer, shall enter in the detail and assessment list of the current year any property shown to have been omitted from the assessment list of any preceding year, at the valuation of that year, or if not then valued, at such valuation as the assessor shall determine from the preceding year, and such valuation shall be stated in a separate line from the valuation of the current year. Where improvements have not been valued and assessed as a part of the real estate upon which the same may be located, as evidenced by the assessment rolls, they may be separately valued and assessed as omitted property under this section: *Provided*, That no such assessment shall be made for any period more than three years preceding the year in which such improvements are valued and assessed: *Provided, further*, That no such assessment shall be made in any case where a bona fide purchaser, encumbrancer, or contract buyer has acquired any interest in said property prior to the time such improvements are assessed. When such an omitted assessment is made, the taxes levied thereon may be paid within one year of the due date of the taxes for the year in which the assessment is made without penalty or interest. [1951 1st ex. s.c. 8 § 1; 1925 ex. s.c. 130 § 59; formerly RRS § 11142.]

## STATEMENT

This action was instituted by the United States for the condemnation of certain leasehold interests and easements held by the petitioners. (R. 3-25.) The United States deposited in the District Court the amount of \$253,000 as estimated compensation under a declaration of taking filed March 1, 1958 (R. 152), which sum was allocated among the three petitioners as follows: Moses Lake, \$126,500; Larsonaire, \$65,300; Larson Heights, \$61,200. (R. 344.) The respondent, Grant County, Washington, petitioned the court for an order directing that virtually all of the deposited amount should be distributed to it in satisfaction of tax liens it held on the condemned property for the years 1955 through 1959.<sup>1</sup> (R. 83-87.) The District Court disallowed the county's claims except for those against Moses Lake for the years 1955 and 1956. (R. 158.) Appeals and cross-appeals were taken pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. (R. 342.) The Court of Appeals reversed in part and affirmed in part. (R. 369.) The relevant facts may be summarized as follows:

Moses Lake, Larsonaire, and Larson Heights, petitioners herein, were sponsors of Wherry Act housing projects on Larson Air Force Base pursuant to leases executed by the Secretary of the Air Force under

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<sup>1</sup> The county's claims against petitioners' interests were as follows: Moses Lake, \$142,285.73, Larsonaire, \$68,838, Larson Heights, \$47,088. (R. 345.) Thus, the county's claims against Moses Lake and Larsonaire were greater than the amount deposited for them by the United States. Had the county been successful in its petition, it would have received all but \$14,112 of the deposited sum.

Title VIII of the National Housing Act (12 U.S.C. 1958 ed., Sec. 1748). (R. 152.)

As sponsors, they entered into separate leases with the United States pursuant to Sections 801 to 809 of Title VIII of the National Housing Act (12 U.S.C. 1958 ed., Secs. 1748, 1748a to h-1). The Moses Lake lease was entered into on May 31, 1950, the Larsonaire lease on August 6, 1953, and the Larson Heights lease on August 2, 1954. (R. 342.)

By the terms of each lease, the respective lessees were to erect, maintain, and operate on the military reservation a housing project for a period of seventy-five years unless sooner terminated by the Government. The projects were financed by F.H.A. insured loans. The housing units were to be leased to military and civilian personnel assigned by the military commander.

Under the terms of these leases the buildings and improvements as completed became real estate and property of the United States. Upon expiration of the leases or their earlier termination, all such improvements were to remain the property of the Government without further compensation. After the completion of the buildings and improvements, and until March 1, 1958, the respective sponsors operated the rental housing projects in the manner contemplated by the leases. (R. 342-343.)

In order to build the projects, the lessees obtained F.H.A. insured loans in the amount of more than \$6,000,000. (R. 89, 94, 236, 287.) Those loans were

secured by mortgages on the leasehold interests of the petitioners. (R. 236.)

Larson Air Force Base is located in Grant County, Washington. In June 1954, the county assessor listed the physical improvements placed upon the Base by Moses Lake in his "Detail and Assessment List" for 1955 taxes. (R. 343.) One month thereafter, in July 1954, the county was restrained by the Superior Court of the State of Washington from levying or attempting to levy taxes against the property of Moses Lake. That injunction remained in effect until December 1957 when the Supreme Court of the State of Washington set it aside and held that the leasehold interest of Moses Lake was taxable at the valuation of the improvements. Immediately after that decision, the county (1) levied on the Wherry Act property of Moses Lake for taxes for the year 1955 pursuant to its previous assessment thereon and (2) assessed and levied upon the property of Moses Lake for the years 1956, 1957, and 1958. (R. 343.) At the same time, it assessed and levied upon the Wherry Act property of Larsonaire for the years 1956, 1957 and 1958, and upon the property of Larson Heights for the years 1957 and 1958. (R. 152-153, 343-344.) Those properties were assessed as omitted property pursuant to Section 8440.080 of 7 Revised Code of Washington.

Subsequently, the county assessed the properties here involved for taxes for the year 1959.<sup>2</sup> (R. 344.)

<sup>2</sup> The District Court held (R. 158) that, since the taxes for 1959 did not become a lien upon the property prior to their being taken by the Government, the county had no claim therefor. On appeal, the county apparently abandoned its



The District Court disallowed all of the county's claims except those against the interest of Moses Lake for the years 1955 and 1956. (R. 158.) The court held that the county's taxes were invalid because, in violation of Section 511 of the Housing Act of 1956, c. 1029, 70 Stat. 1091,<sup>3</sup> the county had (1) failed to give credit to petitioners for certain amounts determined by the designee of the Secretary of Defense to be equal to payments made by the Federal Government to the local public agencies and expenditures of the Federal Government in providing services for the properties involved which would normally be performed by the State or other local authority, and (2) taxed the properties involved on a basis different from and higher than that employed for taxing similar property. (R. 156-158.) The terms of Section 511 do not apply to taxes for which liens were perfected prior to June 15, 1956. The court found that the 1955 and 1956 taxes would have been assessed and levied against the property of Moses Lake prior to June 15, 1956, had the county not been enjoined from doing so. (R. 155.) The court considered that Moses Lake should not profit from an injunction which had been subsequently dissolved and, therefore, treated the levies for 1955 and 1956 as having been made prior to June 15, 1956. (R. 157.) Accordingly, the

claim for that year, and, in any event, the Court of Appeals affirmed the District Court on that issue. (R. 364.)

<sup>3</sup> That section amended Section 408 of the Housing Amendments of 1955, c. 783, 69 Stat. 635, *supra*, pp. 2-3.

<sup>4</sup> In the State of Washington, a property tax does not become a lien until the property is levied upon. (R. 350.)



court allowed the county's claim against the interest of Moses Lake for those years. (R. 158.) However, the county officials had not been restrained from assessing the properties of Larsonaire and Larson Heights, and, consequently, the properties of those companies were treated as having been levied upon subsequent to the effective date of the prohibitions contained in Section 511, with the result that the taxes against those properties were void. (R. 158, 365.)

The Court of Appeals affirmed the decision of the District Court as to its allowance of the county's claims for the years 1955 and 1956 against Moses Lake in full. (R. 348.) The court agreed with the reasoning of the District Court on that issue and held additionally that Moses Lake was precluded by the principle of *res judicata* from attacking the validity of the taxes for those years. (R. 348-352, 367-368.)

The court below noted that, but for the injunction against the county, the 1957 taxes for the property of Moses Lake would have been assessed prior to June 15, 1956, and that, under Washington law, an assessment creates an inchoate lien. (R. 352.) The court held that the perfected lien created by the levy against the property related back to the date on which the inchoate lien arose, i.e., the date of assessment. (R. 352.) Accordingly, the county's claim against Moses Lake for the year 1957 was also allowed in full, and the District Court was overruled on that issue. (R. 352-353, 368.)

As to the remaining claims of Grant County,<sup>3</sup> the Court of Appeals affirmed the District Court's determination that the taxes involved violated the prohibitions contained in Section 511. However, the court held that the effect of Section 511 was not to invalidate the entire tax, but required only that the amount collectible be reduced to what it would have been if levied on property other than that held under the Wherry Act. (R. 354.) The court affirmed the District Court's finding that the basis employed by the county in valuing Wherry Act project leaseholds was different from and greater than the basis employed in taxing other leaseholds. However, it remanded the cause for a determination as to the amount of that difference. (R. 354, 368-369.)

#### SUMMARY OF ARGUMENT

Under the law of Washington as declared by the highest court of that State, leaseholds of federal property are to be valued on a basis different from and higher than that employed in appraising leaseholds of other tax-exempt property. As a result of that difference in treatment, the leaseholds of the petitioners were subjected to a higher tax than would have been the case had their leased property not belonged to the United States. Since there is no justification for that discrimination, it is unconstitutional; accordingly, the taxes levied are void and cannot be collected.

<sup>3</sup> These involved taxes levied against Moses Lake payable in 1958, against Larsonaire Homes payable in 1956, 1957 and 1958, and against Larson Heights payable in 1957 and 1958. (R. 368.)

If a reassessment of that property is appropriate, it can be performed only by the county officials charged with that duty. The District Court is without jurisdiction to reassess the property and to levy the county tax thereon. The power to assess or reassess the property and levy taxes is within the exclusive province of the county taxing officials. Moreover, as to petitioner Moses Lake for the years 1955, 1956 and 1957, the court below erroneously directed the discriminatory tax to be paid in full.

#### ARGUMENT

THE WASHINGTON AD VALOREM TAXATION OF WHERRY ACT PROJECTS IS UNCONSTITUTIONAL IN THAT IT UNLAWFULLY DISCRIMINATES AGAINST LESSEES OF THE UNITED STATES

Pursuant to the decision of the Supreme Court of the State of Washington in *Moses Lake Homes v. Grant County*, 51 Wash. 2d 285, 317 P. 2d 1069, the respondent assessed and levied taxes against petitioners' interests in the Wherry Act projects on the basis of the full value of the improvements thereon, which belonged to the United States. When imposed by non-discriminatory state law, that manner of taxation in appropriate circumstances is not unconstitutional *per se*. *Offutt Housing Co. v. Sarpy County*, 351 U.S. 253. And see *United States v. City of Detroit*, 355 U.S. 466; *United States v. Township of Muskegon*, 355 U.S. 484. However, the Washington tax is in our view unconstitutional because it is based upon a method of valuation that is different and higher for leaseholds of federal property than it is for leaseholds of other tax-exempt property.

A. THE WASHINGTON AD VALOREM TAX DISCRIMINATES AGAINST  
LESSEES OF FEDERAL PROPERTY.

Section 84.40.030 of the Revised Code of Washington, pp. 3-4, *supra*, provides that all property shall be assessed at fifty percent of its true and fair value. The section further provides that "Taxable leasehold estates shall be valued at such price as they would bring at a fair, voluntary sale for cash." In Washington all leaseholds, including leaseholds of tax-exempt property, are valued on the basis of both their burdens and their benefits. *Metropolitan Building Co. v. King County*, 72 Wash. 47, 129 Pac. 883; *In re Metropolitan Building Co.*, 144 Wash. 469, 258 Pac. 473; *Metropolitan Bldg. Co. v. King County*, 62 Wash. 409, 113 Pac. 1114. The market value of a leasehold would, of course, depend upon the extent to which it is encumbered. For that reason, in evaluating a leasehold for tax purposes, all burdens such as mortgages on the leasehold must be deducted from its face value. *Ibid.*

The *Metropolitan* cases are particularly apposite here. Indeed, even the facts of those cases are remarkably similar to the facts here involved. The Metropolitan company was the owner of a 50-year lease of land belonging to the State. Metropolitan built improvements upon the land which immediately became the property of the State. The leasehold was heavily burdened by mortgages. In *Metropolitan Bldg. Co. v. King County*, 62 Wash. 409, 113 Pac. 1114, the court held that it was error to assess the

\* All property of the State is tax-exempt. Section 84.36.010, Revised Code of Washington.

leasehold on the basis of the value of the improvements. In a later proceeding (72 Wash. 47, 129 Pac. 883), the court emphasized that a tax valuation must consider the burdens on a leasehold as well as its benefits and that mortgages must, therefore, be considered in computing the leasehold's value. While the *Metropolitan* cases involved lessees of tax-exempt property, the holding was not so limited and applied to all leaseholds.

Thus, had petitioners been lessees of property from any source other than the Federal Government,<sup>1</sup> the valuation of their property interest would have been based upon the market value of their leasehold, the computation of which would require a consideration of the amount of mortgages thereon. However, the Supreme Court of the State of Washington has held that the value of a leasehold of a Wherry Act project is measured by the full value of the improvements thereon, and the owner of the lease is taxed accordingly. *Moses Lake Homes v. Grant County*, 51 Wash. 2d 285, 317 P. 2d 1069.<sup>2</sup> The court did not overrule the *Metropolitan* decisions in that case. To the contrary, the court clearly indicated that the decision in *Moses Lake Homes* was restricted to lessees of federal property. The reason for the court's extraordinary

<sup>1</sup> The Federal Government is not the only entity whose property is exempt from taxation in Washington. The list of exempt entities includes, *inter alia*, the State, cemeteries, churches, libraries, orphanages, nursing homes, hospitals, schools and colleges. See Chapter 84.36 of the Revised Code of Washington.

<sup>2</sup> *Moses Lake Homes* is the case that set aside the injunction which Moses Lake had obtained against the respondent.



treatment of the leaseholds in *Moses Lake Homes* is that it believed that the decision of this Court in *Offutt Housing Co. v. Sarpy County*, 351 U.S. 253, was dispositive of the question of the valuation of Wherry Act leasehold interests in all states. The court stated (51 Wash. 2d, pp. 286-288, 317 P. 2d, pp. 1070-1071):

We think the case of *Offutt Housing Co. v. Sarpy County*, 351 U.S. 253, 76 S. Ct. 814, 819, 100 L. Ed. 1151, is controlling herein upon the question of the value of the respondent's leasehold interest.

We follow the *Offutt* case, and hold that the value of respondent's leasehold interest, at the nominal rent reserved, is the full value of the buildings and improvements. We do this because the supreme court of the United States is the final authority on the extent of the Federal government's waiver of immunity of Federal projects from state and local taxation, and because of the desirability of uniform taxing benefits among the several states where these housing projects are located.

The concurring opinion of Judge Donworth, in which Judge Foster and Chief Judge Hill concurred, stated (51 Wash. 2d, p. 288, 317 P. 2d, p. 1071):

I am constrained to concur in the result of the foregoing opinion solely because I am bound by the majority opinion in *Offutt Housing Co. v. Sarpy County*, 351 U.S. 253, 76 S. Ct. 814, 100 L. Ed. 1151. The Wherry Act, as interpreted by that decision of the U.S. Supreme Court, is, by the provisions of Art. VI



of the United States Constitution, declared to be the supreme law of the land, and is binding upon state judges regardless of any state laws to the contrary. Hence, I concur in the reversal of the trial court's judgment.

The *Offutt* decision, however, does not require states to appraise Wherry Act leaseholds on the basis of the value of the improvements thereon. It holds that such procedure is not unconstitutional *per se*, i.e., that states which have such a procedure may apply it to Wherry Act leaseholds. *Offutt* involved the law of Nebraska which employs that procedure for all leaseholds of tax-exempt property and, therefore, may validly apply it to leasehold of federal property.

However, assuming that the decision of the Supreme Court of Washington in *Moses Lake Homes* is the definitive statement of the state law as to the manner in which leaseholds of federal property are evaluated,<sup>\*</sup> under that ruling, the value of the petitioners' leaseholds is measured by the full value of the improvements upon the property without any consideration to the large amounts of mortgages (more than \$6,000,000) upon the leaseholds. Thus, the state tax on petitioners' leaseholds is much greater than it would be if they had leased tax-exempt property which was not owned by the Federal Government. In the latter case, their property would be

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<sup>\*</sup> While in *Moses Lake Homes* the court grounded its holding on a federal decision, its ruling nevertheless, determined the operation of the Washington taxing statute (7 Revised Code of Washington, Section 84.40.030) to lessees of federal property.

valued on the basis of the market value of their leaseholds which would allow for consideration of the large encumbrances upon that property.<sup>10</sup>

Nor can respondent find any comfort in its contention, made below, that the leaseholds of the petitioners may be treated differently from other leaseholds because the life of the lease will outlast the improvements. (R. 353-354.) There is no evidence in this record that the lease will outlast the improvements. To the contrary, the District Court, in its oral opinion, indicated that it was quite possible that the improvements would outlast the lease, particularly in view of the petitioners' obligation to repair and replace. (R. 318.) Moreover, even if the lease would outlast the improvements, that would, at the most, only demonstrate that the benefits of the leasehold should be measured by the full value of the improvements. It would not explain why the burdens of the leaseholds (*i.e.*, the mortgages) should have been excluded from consideration. It was primarily because of the exclusion of the petitioners' mortgages from the county's evaluation when they would have been considered in an evaluation of any other leasehold<sup>11</sup>

<sup>10</sup> It is noteworthy that, because of the county's failure to consider the amount of the mortgages on the leaseholds in evaluating the latter, the tax claims of the county against Larsonaire and Moses Lake for three to four years respectively are greater than the amount deposited for them by the United States as compensation for the entire balance of their lease (*i.e.*, about 70 years). See n. 1, p. 6, *supra*.

<sup>11</sup> In the State of Washington, a lessee is not treated as an owner of the leased property regardless of the length of his lease. Thus, a lessee of property for a term of 999 years was held to be a lessee rather than an owner. *State ex rel. Hellar v.*

that both courts below found the Washington tax to be discriminatory. The District Court found that (R. 155-156):

The State of Washington by statute, Section 84.40.030 of the Revised Code of Washington, provides that taxable leasehold estates shall be valued at such price as they would bring at a fair, voluntary sale for cash. The Supreme Court of the State of Washington has held with respect to leaseholds other than Wherry housing project leaseholds that in valuing the leasehold for taxation purposes it must be measured by its market value considered in the light of its burdens and benefits. *Metropolitan Building Co. v. King County*, 72 Wash., 47; 192 Pac., 887. *Metropolitan Building Co. v. King County*, 62 Wash., 409. *In re Metropolitan Building Co.*—144 Wash., 469; 258 Pac., 473. The State of Washington has followed a different method of evaluating Wherry housing projects for taxation purposes by decision of its Supreme Court. In the case of *Moses Lake Homes, Inc. v. Grant County*—151 Wash., Dec., 254, whereby the Supreme Court held that with respect to Wherry housing project leases the value of the leasehold interest in [sic] the full value of the buildings and improvements. By the laws of the State of Washington as declared by its Supreme Court, taxes and assessments on Wherry housing projects are thus

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*Jackson*, 82 Wash. 351. Consequently, in *Moses Lake Homes*, the Supreme Court of Washington expressly held that petitioners' interests in the Wherry Act projects were to be valued and taxed as leaseholds. In any event, lessees of federal property may not be taxed on property other than the leasehold.

\*See *Offutt Housing Co. v. Sarpy County*, *supra*.

levied upon a basis different and higher than the amount of taxes and assessments on other similar property of similar value.

The Court of Appeals affirmed this finding as follows (R. 354):

The trial court's further finding that a different method was used in valuing the Wherry Act project leasehold here in question is also correct. Likewise to be sustained is the court's finding that the method used in assessing the Moses Lake leaseholds resulted in a higher tax than would have been true in the case of a non-Wherry Act leasehold.

**B. THE WASHINGTON AD VALOREM TAXES ON THE LEASEHOLDS OF THE PETITIONERS ARE VOID**

It is well settled that a state tax may not discriminate against the Federal Government or against those with whom it does business. *E.g.*, *Phillips Co. v. Dumas School Distr.*, 361 U.S. 376; *United States v. City of Detroit*, 355 U.S. 466, 473; *City of Detroit v. Murray Corp.*, 355 U.S. 489, rehearing denied, 357 U.S. 913; *Alabama v. King & Boozer*, 314 U.S. 1; *Graves v. N.Y. ex rel. O'Keefe*, 306 U.S. 466; *McCulloch v. Maryland*, 4 Wheat. 316. In *United States v. City of Detroit*, *supra*, at p. 473, this Court stated that:

It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals. \* \* \*

In *Offutt Housing Co. v. Sarpy County*, *supra*, this Court held that the Wherry Act incorporated Section

6 of the Military Leasing Act of 1947 (61 Stat. 774) which provided that a lessee's interest made or created pursuant to that Act was subject to state or local taxation. However, that provision did not authorize the states to tax such lessees on a discriminatory basis. *Phillips Co. v. Dumas School Distr.*, 361 U.S. 376. In the latter case, this Court held that a discriminatory tax on a lease executed under the Military Leasing Act of 1947 was void.

After the *Offutt* decision, Congress amended the Wherry Act by Section 511 of the Housing Act of 1956. Section 511 also was not intended to waive the constitutional prohibition against discrimination. The legislative intent in enacting that section was to insure:<sup>12</sup>

that States and communities, under adequate State tax statutes, would be able to obtain from Wherry Act projects taxes and assessments which, with payments and expenditures by the Federal Government for services in connection with the projects, would equal the taxes and assessments collected by the local taxing officials from other similar property.

Thus, the Act required that after June 15, 1956, state and local taxing authorities must reduce the normal tax load on Wherry Act leaseholds by an amount determined by the designee of the Secretary of Defense to be equal to certain payments made by the Federal Government concerning those projects which expense would normally be borne by the local gov-

<sup>12</sup> H. Rep. No. 2363, 84th Cong., 2d Sess., pp. 48-49 (3 U.S.C. Cong. & Adm. News (1956) 4555).



ernment. There is nothing in the Act or its history to indicate that states were thereby authorized to tax such leaseholds discriminatorily either before or after June 15, 1956. Discriminatory taxes were at all times prohibited by the Constitution. Section 511 provides a more stringent restriction on local taxing authorities than does the Constitution. The Constitution merely prohibits discriminatory taxes, but Section 511 sets a ceiling on local taxation that is considerably lower than the constitutional demands, i.e., the tax may not be greater than an amount equal to the tax on similar property less a determined sum. It is inconceivable that Congress intended to waive the constitutional prohibition against tax discrimination in an Act designed to increase the restrictions on local taxation. For that reason, the holding of the court below that the taxes on the property of Moses Lake for the years 1955 through 1957 were valid because they would have been assessed prior to June 15, 1956, is untenable.<sup>13</sup> Irrespective of the applicability of Section 511, those taxes are invalid because they contravene the constitutional prohibition against discrimination.

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<sup>13</sup> The court also held that Moses Lake was precluded by the principle of *res judicata* from attacking the validity of the taxes against it for the years 1955 and 1956. We have taken no position on the merits of that issue nor on the question of whether it may properly be reviewed here in view of the terms of the question to which this Court limited certiorari. In any event, the holding of the court below that the tax on the leasehold of Moses Lake for the year 1957 is collectible in full cannot be sustained.



Indeed, this Court has recently passed upon the identical question presented here and held that a similarly discriminatory state tax was void. *Phillips Co. v. Dumas School Dist.*, 361 U.S. 376. In *Phillips*, the State of Texas exacted a more burdensome tax on lessees of federal property than it did on lessees of other tax-exempt property. There was no justification for that discrimination. In holding the tax void, the Court stated (361 U.S. at pp. 385, 387):

But where taxation of the private use of the Government's property is concerned, the Government's interests must be weighed in the balance. Accordingly, it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself. Compare *Esso Standard Oil Co. v. Evans*, 345 U.S. 495, 500.

\* \* \* It follows that Article 5248, as applied in this case, discriminates unconstitutionally against the United States and its lessee. As we had occasion to state, quite recently, it still remains true, as it has from the time of *M'Culloch v. Maryland*, 4 Wheat. 316, that a state tax may not discriminate against the Government or those with whom it deals. See *United States v. City of Detroit*, *supra*, at 473. Therefore, this tax may not be exacted. [Emphasis added.]

The court below agreed with the District Court that the Washington taxes were discriminatory. However, the court further held that, under Section 511, that fault could be cured with respect to the taxes which it considered governed by Section 511 by re-

ducing the amount of the taxes to a sum that was not discriminatory. There is nothing in the history or language of Section 511 which would justify that interpretation. As noted above, Section 511 did not change the constitutional prohibition against discrimination. A discriminatory tax is void and "may not be exacted." *Phillips Co. v. Dumas School Distr.*, *supra*, 361 U.S. at p. 387; *Hanover Ins. Co. v. Harding*, 272 U.S. 494; *Board of Directors v. Miller Pipe Line Co.*, 292 Fed. 474 (C.A. '8), certiorari denied, 263 U.S. 718, appeal dismissed, 267 U.S. 573. What the court below has done, in effect, is to decree a valid tax for the invalid tax which the State of Washington attempted to exact. That it can not do. The tax here involved was levied by the appropriate taxing officials of Grant County pursuant to a decision of the highest court of the State of Washington. In *Moses Lake Homes v. Grant County*, 51 Wash. 2d 285, 317 P. 2d 1069, the Supreme Court of the State

"In *Hanover*, the Court held that an Illinois tax was invalid because it discriminated against the petitioner and thereby denied petitioner the equal protection guaranteed to it by the Constitution. The court emphasized that it must accept the determination of the Illinois Supreme Court as to the application of the tax law to petitioner. On remand, the Illinois Supreme Court reversed its earlier determination and held that, under state law, the petitioner was not to be treated differently. (317 Ill. 366, 148 N.E. 23.) Had the Illinois Supreme Court not changed its interpretation, the tax would have been unconstitutional and no part of it could be collected. Of course, this Court cannot overrule the decision of the Washington Supreme Court but must accept that court's statement of the impact of the local tax on lessees of federal property. *E.g.*, *West v. A.T. & T. Co.*, 311 U.S. 223, 236.

of Washington held that the value of Wherry Act leaseholds for local tax purposes was measured by the full value of the improvements on the property. The court below may neither overrule that decision nor may it fashion, assess and levy a tax different from that imposed, assessed and levied by the local law and local officials. Cf., *United States v. New Orleans*, 98 U.S. 381, 392; *Hunt v. District of Columbia*, 108 F. 2d 10 (C.A. D.C.). It may only determine whether the tax levied by those officials is valid or invalid. If valid, the taxes should be collected. If invalid, the tax may not be exacted and no part of it may be collected. E.g., *Phillips Co. v. Dumas School Distr.*, *supra*. And see *Hanover Ins. Co. v. Harding*, *supra*; and *Board of Directors v. Miller Pipe Line Co.*, *supra*.

The court below agreed with the District Court that the assessment of petitioner's leasehold on the basis of the value of the improvements thereon was invalid. However, it held, in effect, that the District Court must determine the value of the leasehold and then compute the tax on that basis. In other words, the District Court is to reassess the leaseholds and levy a non-discriminatory tax thereon, applying a tax different from that declared by the highest state court.

It is difficult to find the source of the authority of the Court of Appeals to direct assessment and levy of local taxes, inasmuch as that power is normally vested only in the state legislatures. See *United States v. New Orleans*, 98 U.S. 381, 392. Moreover, the court below seeks to *reassess* the property, and

reassessments, not being favored by the law, can only be made when expressly authorized by statute. *E.g.*, *Tumulty v. District of Columbia*, 102 F. 2d 254 (C.A. D.C.). In Washington, the relevant statute provides that if "any tax or portion thereof levied against any property" is held void, "the county and state officers authorized to levy and assess taxes on the property shall", within one year after the final judgment declaring the tax or portion thereof to be void, relist and reassess the property. 7 Revised Statutes of Washington, Section 84.24.080.

Moreover, under the Washington Constitution, no person other than the appropriate county officials may reassess property for the purposes of computing the county *ad valorem* tax thereon. Art. 11, Section 12 of the Washington Constitution. See *State ex rel. State Tax Comm. v. Redd*, 166 Wash. 132, 6 P. 2d 619. In that case, a Washington statute authorizing the state tax commission to reassess property was held unconstitutional.<sup>15</sup>

While there apparently are no Washington cases discussing this question, there are several decisions of other state courts holding that, in situations such as this, a court may adjudge a tax valid or invalid but it may not reassess or revalue the property. *In re Blatt*, 41 N. Mex. 269, 287, 67 P. 2d 293, 304; *State v. Richardson*, 126 Tex. 11, 84 S.W. 2d 1076. Even assuming *arguendo* that the District Court was empowered to separate the part of the tax that was void from the part that was valid and enforce the latter,

<sup>15</sup> The court also held that in Washington the word "assessment" meant the valuation of property to be taxed.

it could do so only where nothing more than a mathematical calculation was involved; it could not substitute its discretion for that of the taxing officials of the county by determining the value of the leaseholds.<sup>16</sup> *State v. Richardson, supra.*

#### CONCLUSION

The Washington *ad valorem* tax on leaseholds, as here applied, unlawfully discriminates against the United States and its lessees. It is, therefore, repugnant to the Constitution of the United States and the taxes for none of the years involved, contrary to the judgment below, may be collected in full. If for any of the years a reassessment is appropriate, administering a different and non-discriminatory tax, it must be administered by the proper taxing officials of Grant County and not by a federal court. The judgment below should be reversed and the taxes levied for all years be declared void.

Respectfully submitted.

J. LEE RANKIN,  
*Solicitor General.*

CHARLES K. RICE,  
*Assistant Attorney General.*

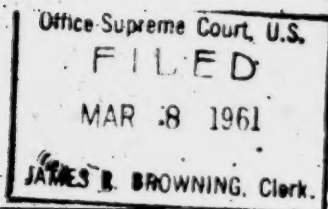
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JANUARY 1961.

<sup>16</sup> It is noteworthy that the Washington statute concerning reassessments (7 Revised Statutes of Washington, Section 84.24.080) provides that, after a court has adjudged a tax void in whole or in part, the *county officials* shall reassess the property. Thus, it could appear that Washington intended to leave that function to the proper taxing officials and not to the courts.



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In the  
**Supreme Court of the United States**

OCTOBER TERM, 1960

**No. 212**

**MOSES LAKE HOMES, INC., ET AL.,** *Petitioners,*  
vs.  
**GRANT COUNTY,** *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF RESPONDENT**

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**In the  
Supreme Court of the United States**

OCTOBER TERM 1960

MOSES LAKE HOMES, INC., ET AL.,

*Petitioners,*

vs.

GRANT COUNTY,

*Respondent.*

No. 212

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF RESPONDENT**

**STATUTES INVOLVED**

28 U.S.C.A. § 2281.

Applicable state statutes omitted by the Petitioners  
are:

|                   |                   |
|-------------------|-------------------|
| R.C.W. 84.04.080; | R.C.W. 84.48.080; |
| R.C.W. 84.08.130; | R.C.W. 84.52.010; |
| R.C.W. 84.08.140; | R.C.W. 84.52.030; |
| R.C.W. 84.40.040; | R.C.W. 84.52.040; |
| R.C.W. 84.40.050; | R.C.W. 84.52.050; |
| R.C.W. 84.40.080; | R.C.W. 84.52.070; |
| R.C.W. 84.40.130; | R.C.W. 84.52.080; |
| R.C.W. 84.40.180; | R.C.W. 84.52.090; |
| R.C.W. 84.40.200; | R.C.W. 84.56.010; |
| R.C.W. 84.40.320; | R.C.W. 84.56.050; |
| R.C.W. 84.48.010; | R.C.W. 84.60.030; |
| R.C.W. 84.48.020; | R.C.W. 84.68.010; |
| R.C.W. 84.48.040; | R.C.W. 84.68.070. |

## CONSTITUTION

Washington State Constitution, Art. VII, § 1 (14th Amend.) and Art. VII, § 2 (17th Amend.)

## DECISIONAL LAW

Both the Circuit Court (R. 350) and the District Court (R. 154, III) relied upon *Puget Sound Power & Light Co. v. Cowlitz County*, 38 Wn.(2d) 907, 234 P.(2d) 506 (1951) as correctly interpreting state tax law and R.C.W. 84.60.030. Subsequent to the opinion below, that case was overruled by *Air Base Housing, Inc. v. Spokane County*, 156 Wash. Dec. 604 (Adv. No. 20, Aug. 25, 1960).

## QUESTIONS PRESENTED

(1) Does Washington tax law discriminate against private lessees of federal land?

(2) If so, is res judicata a bar to a collateral contest of the tax in a condemnation action?

(3) Does the failure of a taxpayer to administratively contest questions of valuation of his property bar subsequent collateral attacks?

(4) Have the Petitioners proven discrimination?

(5) Are these Petitions premature since the Circuit Court remanded the cause to the District Court to permit the Petitioners to prove their alleged discrimination (R. 368-9)?

## COUNTER STATEMENT OF THE CASE

### 1. Preface

Petitioner asks this Court to overrule itself on a federal question and the Supreme Court of Washington on a state issue.

### 2. Facts

#### A. General

The issues and facts are complex but all have previously been decided in unappealed final judicial decisions. Complete presentation is difficult because of the lack of a true trial in the District Court.

The three Petitioner corporations, all located at 1021 Westlake North, Seattle, Washington, are owned, operated and represented by the same persons (R. 88-89; 94). Each has leased lands from the United States at Larson Air Force Base near the town of Moses Lake, Washington. The leases are for 75 years and the rental is \$100 per year (R. 89; 103-127; and see *Moses Lake Homes v. Grant County*, 51 Wn.(2d) 285 at 286, 317 P.(2d) 1069 (1957).

#### B. Moses Lake Homes, Inc.

This was the first corporation. It was organized in 1950 to construct and operate 400 rental units on the land it leased from the United States for \$100 per year (R. 106). (The lease set forth at R. 103-127 is between the United States and Larson Heights, Inc. With the exception of the land, dates, number of housing units and project cost, etc., it is practically identical to the other leases.) The arrangements were almost identical

to those in *Offutt Housing Co. v. County of Sarpy*, 351 U.S. 253, 100 L. Ed. 1151 (1955).

The Moses Lake Lease originally provided in part:

"11. \* \* \* Upon the expiration of this lease, or earlier termination, all improvements made upon the leased premises shall *become* the property of the government without compensation, \* \* \*" (Emphasis supplied).

In 1952 Grant County assessed the rental units to Petitioner as owner.

Immediately thereafter the lease was modified to provide that title to the improvements was retroactively in the United States. The new paragraph 11 (paragraphs 11 in the Larsonaire and Larson Heights leases (R. 113-114) and paragraph 11 in the lease in *Offutt Housing Co. v. Sarpy County*, 351 U.S. 253, 100 L. Ed. 1151 (1955)) all provided:

"1.. \* \* \* Upon the expiration of this lease, or earlier termination, all improvements made upon the leased premises shall *remain* the property of the government without compensation, \* \* \*" (Emphasis supplied).

Other paragraphs of the leases provide that this was the "lessee's project" (R. 112 No. 9); that the lessee and the mortgage company would divide the fire insurance between them—the United States, as "title holder" was not even a named insured (R. 119-120, No. 20); and the lessee had possession with the United States having a right to enter (R. 115, No. 14). Paragraph 8 (R. 111-112) specifically requires:

"8. That the Lessee shall pay to the proper au-



thority, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises. In the event any taxes, assessments, or similar charges are imposed with the consent of the Congress of the United States upon the property owned by the Government and included in this lease (as opposed to the leasehold interest of the Lessee therein), this lease shall be renegotiated so as to accomplish an equitable reduction to the rental provided above, which shall not be greater than the difference between the amount of such taxes, assessments, or similar charges and the amount of any taxes, assessments or similar charges which were imposed upon such Lessee with respect to his leasehold interest in the leased premises prior to the granting of such [116] consent by the Congress of the United States; provided, however, that the amount of such reduction in rental shall in no event be more than 50 percent of the rental provided above; provided, further, that in the event that the parties hereto are unable to agree, within ninety (90) days from the date of the imposition of such taxes, assessments, or similar charges, upon an equitable reduction in rental, such failure to agree shall be considered to be a question of fact within the meaning of the clause of this lease relating to disputes."

Thus, in truth, the government had

"title, but only a paper title" *Offutt Housing Co. v. Sarpy*, 351 U.S. 253 at 261, 100 L.Ed. 1151 at 1160 (1955)

For example, the lessees mortgaged the improve-

ments by "chattel mortgages" (R. 81 *et seq.*) whereas the land (owned by the United States) was not mortgaged.

Washington law requires that all property uniformly be assessed at 50% of its true and fair value in money, Wash. Constit. VII § 2 (17th Amend. 1944).

The value of the property was assessed as follows:

| Name           | Assessed<br>Value     | Mortgage                | Fire<br>Insurance      |
|----------------|-----------------------|-------------------------|------------------------|
| Moses Lake     | \$500,000<br>(R. 128) | \$3,236,000<br>(R. 89)  | \$2,500,000<br>(R. 90) |
| Harsen Heights | \$100,000<br>(R. 136) | \$1,600,000<br>(R. 89)  | (not in<br>record)     |
| Lysonnaire     | \$100,000<br>(R. 138) | \$1,782,000<br>(R. 143) | (not in<br>record)     |

Obviously, the mortgage encumbrances must have been considered, contrary to the opinion of the circuit court (R. 354, note 18).

The determination of the "value" of the property owned by the various petitioners is presently before the Washington Federal District Court in the condemnation action, E.D., No. Div. No. 1667. Here Petitioners contend that the county assessed the value of their property too high. Below, they urge, the value set by the United States is too low. The impropriety of such inconsistent positions was clear to the Circuit Court which remanded the case for a determination of valuation. (Valuation for taxation and for condemnation purposes are identical, see cases *infra*.)

### C. Chronology of Litigation

Some mention must be made of the long and troubled course these issues have taken through the courts.

**(1) First Case (1952)—*Moses Lake Homes v. Grant County et al*, Grant County No. 8095, Wash. Supreme Court No. 32442 (R. 90 No. 15; 94):**

On May 23, 1952, Respondent assessed these identical taxes for the year 1953 against Petitioner Moses Lake Homes, Inc. Petitioner then modified its lease and brought an action to enjoin both: (1) the 1953 taxes (assessed in 1952) and (2) the taxes *for all subsequent years*.

Following trial on the merits, both aspects of the injunction were denied and petitioner appealed to the Supreme Court of Washington. Before formal argument but after submission of its brief (which urged the very identical issues urged here) in September 1953, Petitioner withdrew its appeal and the State Supreme Court issued its Judgment Against Petitioner on Remittitur. *Petitioner (Moses Lake Homes, Inc.) then paid these very taxes.*

**(2) Second Case (1954)**

**(a) First Appeal (*Moses Lake Homes, Inc., v. Grant County, et al*, 49 Wn.(2d) 182, 209 P.(2d) 840 (1956))**

When the assessor, in 1954, assessed the property, Petitioner sought another injunction, asking that Grant County:

“be permanently restrained and enjoined from levying any tax against the plaintiff upon the said

improvements erected by the plaintiff upon the said leased lands for the year 1955, and further be permanently restrained and enjoined from making any assessment or levy against the plaintiff in the future upon said improvements \* \* \* *Moses Lake Homes, Inc., v. Grant County, supra*, 49 Wn.(2d) at p. 185.

The issue in that case, as stated by the Court was:

"The question presented by the appeal of Grant County is whether it may levy and collect an *ad valorem* tax on the buildings located on the leased premises (and equipment placed therein), based on the assessed value thereof as determined by the county assessor on the theory that respondent is *the owner* thereof.

"Respondent contends that such a tax may be levied only on *its leasehold interest* in buildings and not as though it were the owner of them." (49 Wn.(2d) at p. 183).

Grant County and the State of Washington had appealed because the trial court had refused to allow the state to intervene as a party. The cause was sent back for retrial.

(b) **Second Appeal—*Moses Lake Homes, Inc., v. Grant County*, 51 Wn (2d) 285, 317 P.(2d) 1069 (1957)**

The cause was then re-tried and appealed. There was no change of issues. The State Supreme Court in this case stated:

"The term of the lease is longer than the length of the useful life of the buildings \* \* \*." 51 Wn. (2d) at p. 286.

As an analysis of the decision will disclose, it made<sup>3</sup> no difference whether Petitioner was a "beneficial owner" of the improvements or whether the leasehold was valued at the worth of the buildings because under Washington *and* general law

"The value of the leasehold, for which a nominal rental was paid, would therefore be the worth of the buildings, because the lessee would have the entire enjoyment of them." 51 Wn.(2d) at p. 286.

*There is no Washington case contrary to the above.*

The petitioner did not seek certiorari to this Court. These very taxes were involved.

There is also a third case, *Moses Lake Homes, Inc. v. State*, 48 Wn.(2d) 499, 294 P.(2d) 1113 (1956), which held appellant liable for sales tax on its purchases of materials to construct the project.

#### **D. Condemnation**

The opinion in the above cause became final on December 14, 1957, 30 days following the issue of the opinion. The taxes being unpaid, the County Treasurer, on January 21, 1958, issued Notices of Sale (R. 134-139) setting the sales for March 4, 1958 (R. 135, 137, 139).

The Air Force on February 14, 1958, requested the United States Attorney to proceed with condemnation (R. 29) and the Declaration of Taking (R. 18) was executed the same day (R. 25). Service was made of these items on the Grant County prosecutor on March 3, 1958 (R. 39) and the sale was voluntarily continued to March 18, 1958 (R. 53, No. 10). The Respondent

County was enjoined from collecting its taxes by the Federal District Court on March 12, 1958 (R. 61).

### E. Other Petitioners

Two other corporations, Larsonaire Homes, Inc., and Larson Heights, Inc., owned by the same parties, had also built housing units on land leased from the United States.

Because of the uncertainty surrounding the Moses Lake Homes, Inc. litigation, and knowing he would be immediately enjoined, the Grant County Assessor failed to immediately assess the properties of these other corporations.

Following this Court's decision in *Offutt Housing Co. v. Sarpy*, 351 U.S. 253, 100 L.Ed. 1151 (1956), and on January 3, 1957, the Assessor assessed the Larsonaire and Larson Heights properties for previous tax years (R. 344) as "omitted property" as follows:

| Larsonaire Homes, Inc.           |                |             |
|----------------------------------|----------------|-------------|
| Assessment Year<br>and Lien Date | Tax<br>Payable | Tax         |
| May 31, 1955                     | April, 1957    | \$21,750.00 |
| May 31, 1956                     | April, 1957    | 18,798.00   |
|                                  |                | <hr/>       |
|                                  |                | \$40,548.00 |
| Larson Heights, Inc.             |                |             |
| May 31, 1956                     | April, 1957    | \$18,706.00 |

Following the assessment, but before the taxes could be levied in October 1957, these corporations obtained like injunctions.



In *Larson Heights, Inc., v. Grant County*, and *Larsonaire Homes, Inc., v. Grant County*, Grant County Superior Court Nos. 10682 and 10683 (R. 91) Respondent was temporarily enjoined from levying or assessing taxes for 1956, 1957 and all subsequent years, until the Remittitur was handed down in *Moses Lake Homes, Inc., v. Grant County* (2d case). These cases remain untied.

We note with more than some curiosity that the deposit pursuant to the Declaration of Taking was \$253,000 (R. 30). The total taxes assessed prior to the declaration total \$246,481 (R. 344). The amount deposited by the United States pursuant to the Declaration of Taking was \$253,000 (R. 30). This is no happenstance—it is another reason, we suggest, the Circuit Court remanded the cause for a hearing on value.

#### **F. Conclusions of the Circuit Court**

1. The taxes levied against *Moses Lake Homes, Inc.*, for the years 1955 and thereafter could not be contested because of the doctrine of *res judicata* (R. 348).

2. The Petitioner, *Moses Lake Homes, Inc.*, could not contend that the 1955 and 1956 taxes were not levied or assessed prior to June 15, 1956, under Sec. 511 of the Housing Act of 1956, 69 Stat. 652, because it could not profit by its own injunction. (R. 349).

3. The lien of the 1957 tax had attached by relation back prior to June 15, 1956 (R. 352-3).

4. That the County Assessor was not actually restrained from assessing the properties of Petitioner's

Larsonaire, Inc. and Larson Heights, Inc. (R. 364-365). Thus no inchoate lien arose until after June 15, 1956.

5. Washington taxes all leaseholds the same whether the improvements outlast the term or not — except *Wherry Act* leaseholds (R. 353).

6. The Petitioners had failed to sustain the burden of proving actual discrimination, if any (R. 355).

7. The cause was remanded to permit the Petitioners to prove how much, if at all, their taxes exceeded taxes on similar property in Grant County.

8. The cause was also remanded to permit the Petitioners to obtain proper Determinations of Federal Expenditures for use as offsets to local taxes.

## ARGUMENT

### Summary

I. The condemnation and placement of the funds on deposit with the court effected no change in the tax consequences. Condemnation merely substituted the award in which the United States has no interest, for the property which it condemned.

II. The Petitioners were the beneficial owners of taxable interests in real and personal property. They were taxed on the value of the property attributable to them. This is general law, Washington law and Federal law.

III. If Petitioners were taxed discriminatively, it is bound by the doctrine of *res judicata*. Two separate Washington Supreme Court decisions have become final on the very issues urged collaterally before this court.

## Condemnation Does Not Alter the Tax Picture

### A. General

The tax issues here are in no way affected by the condemnation. As the trial court said:

"They have deposited the money and it should be a matter of indifference to the government as to how it is distributed." (R. 205).

The great power of Eminent Domain is not to determine rival claims to property or to its substitute, the award. Its function is to determine public use and necessity and the value of the property to be taken, *Morgan v. Willenau*, 1 S.W.(2d) 193, 58 A.L.R. 4518 (1927). It would be a gross misuse of power if the purpose of this condemnation was to prevent the collection of taxes or to assist these Petitioners to evade such taxes.

Compensation paid for land taken by eminent domain represents the land and is subject to all rights of those having interests in the land, 10 R.C.L. 137; *Cullen & Vaughn Co. v. Bender Co.*, 170 N.E. 633 (Ohio 1930), Anno. 68 A.L.R. 1338 *et seq.*; *Chicago v. Tebbetts*, 104 U.S. 120, 26 L.Ed. 655 (1881); *U. S. v. Dunnington*, 146 U.S. 338, 36 L.Ed. 996 at 1001 (1892).

Incidental to the primary issues, the court has power to determine who are owners of the award if that has not already been previously determined. The condemnation action is a proceeding in rem and the owners and lienholders of the res share in the award, (*U. S. v. 2979.72 Acres of Land, etc.*, 235 F.(2d) 327 (4th Cir. 1956)).

Thus, the rights of the parties which have been de-

terminated by the state courts, as set forth in the Circuit Court opinion below, are binding upon them—the fact that a third party condemns or substitutes a money deposit for the property cannot change rights previously and conclusively resolved.

### **Discrimination Is Non-existent**

#### **1. What are taxes—Valuation**

This is perhaps the most misunderstood in the field of taxation. Without consent, a state may not tax property “owned” by the United States. Since “title” usually is consonant with ownership, it is easy to conclude that the state may not tax property when “title” is in the United States.

A more correct statement would be that the State may not include tax exempt interests in its valuation of property for tax purposes. Under general and Washington law, bare legal title such as under a conditional sales contract, a possibility of reverter or other reversionary interest, or the lessor’s interest in a lease of 99 or 75 years, is not such an interest as to prevent taxation of the full value of the improvements to the lessee. This is particularly true where, as here, the improvements will not last the length of the term, and when all rents from sub-lessees and profits accrue to the lessee.

Since this type of lessee under Washington law is taxed to the full value of the improvements, Appellant can raise no federal question unless he shows that when the lessor is a tax-exempt federal entity, that the value of the lessor’s interest has been included or that discrimination exists. The lessee would then be entitled to

a tax reduction to the value of the exempt non-discriminatory interest but no more. He must establish the value of that interest and the amount of discrimination which has not been done.

Property tax discrimination occurs when one citizen pays more taxes than another having similar property. Actual, not theoretical, discrimination is required. Methods of valuation are constitutionally unimportant to the validity of the tax unless actual discrimination results. Thus, an assessor could "guess" at the valuation of property and if, peradventure, the *results* were uniform and equal there is and can be no discrimination.

The Washington State Constitution, Art. VII, § 1 (14th Amend.) specifically enjoins against discrimination:

"All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be for public purposes only."

The requirement of uniformity is so highly regarded it even prohibits a graduated net income tax, *Culliton v. Chase*, 174 Wash. 363, 25 P.(2d) 81 (1933); *Jensen v. Henneford*, 185 Wash. 209, 53 P.(2d) 607 (1936); *Petroleum Nav. Co. v. Henneford*, 185 Wash. 495, 55 P.(2d) 1056 (1936); *Power, Inc. v. Huntley*, 39 Wn.(2d) 191, 235 P.(2d) 173 (1951) and see *Apartment Operators Association v. Schumacher*, 156 Wash. Dec. 43 (Adv. No. 1, 1960). Yet Petitioners assert the same court blythely authorized a similar discrimination without even a discussion of the issue.

## 2. "Title"

"Title" is not the keystone. It is but one incident in total ownership. Often, as in trusts, title is completely separate from "beneficial" ownership. In tax matters, the clearest example is found where the United States sells property and retains title for security purposes. There the United States has: (1) title, (2) reversionary interest, and (3) an "equity" in the taxed property to the extent of the unpaid sales price. Neither of these interests alone, nor their combination, prevents local taxation of the sold item at its full value to the private purchaser, *S.R.A. v. Minnesota*, 327 U.S. 558, 90 L.Ed. 851 (1946). This is true even though the seller has yet received no payments.

In a conditional sales contract, the seller-owner either has created or originally owned the complete value of the property sold. In a long-term lease where the lessee improves the property for its own use, as here, the lessee rather than the title holder creates the value by constructing at its own expense, and for its own profit, improvements which will not last the length of his possession and use. The lessor's reversionary interest in the improvements is but slightly more than zero. The "value" thereof even less.

The situation is strikingly similar to the doctrine first announced in the income tax case of *Helvering v. Clifford*, 309 U.S. 331, 84 L.Ed. 788 (1940). There to avoid federal income taxes a taxpayer transferred certain interests in trust to others retaining not only the usual trustee's interest but the rights of control and profit. This Court properly held the rights re-



tained constituted beneficial ownership of the *res* which required taxable ownership of income from the entrusted items. The "bundle of rights" the trustee retained was too substantial for him to complain of being taxed as sole owner. See also *Du Pont v. Commissioner of Internal Revenue*, 289 U.S. 685, 689, 77 L. Ed. 1447 (1932).

That the total value of improvements which will not last the term belong to the lessee is not "new" law. For example, for a lessee to have an interest in property that he may depreciate for federal income tax purposes, he must have an "ownership" interest therein, 4 Mertens Fed. Income Taxation, § 23.06. Thus, where a lessee railroad company constructs improvements which will not last the term of its lease, the expenditures are not "additional rentals" to the landlord but capital expenditures made by the lessee for its own total use which it may depreciate over the useful life of the buildings, *Duffy v. Central R. Co.*, 268 U.S. 55, 69 L. Ed. 846 (1925); see also *Gladding Dry Goods Co.*, 2 B.T.A. 336; *Coger v. Comm.*, 44 F.(2d) 554 (6th Cir. 1930); and Reg. 1.167 (a)-4.

The lessee is able to depreciate the entire cost of the improvement because he is the beneficial owner of the total value of the improvement. Further, of course, the lessee's improvements which do not last the length of the term are not income to the landlord, *Blatt Company v. United States*, 305 U.S. 267, 83 L. Ed. 167 (1938) and see annotations at 98 A.L.R. 1207.

Perhaps the most important decisions in this area are the conditional sales cases. In *S.R.A. v. Minnesota*, *supra*, the United States sold property on a conditional

sale to a private citizen specifically reserving legal title until paid in full. Minnesota levied its property tax. The question was the

"power of Minnesota to tax realty within the boundaries of that state, when the legal title remains in the United States." 90 L. Ed., p. 854.

The answer was:

"The whole equitable ownership is in the petitioner and the value of that ownership may be ascertained on the basis of the full value of the land." *New Brunswick v. United States*, *supra*, 276 U.S. 547, 72 L. Ed. 693 (1928), 90 L. Ed. at p. 860.

Where mining claims are involved, federal title is also no bar to state property taxation, *Elder v. Wood*, 208 U.S. 226, 52 L. Ed. 464 (1908).

On an issue involving consumer sales taxes upon materials for a military housing project under what appears an identical lease, the Florida Supreme Court held that beneficial ownership, not "paper title" controls, *Gay v. Jemison*, 52 So.(2d) 117 at 137 (Fla. 1951), see also *Moses Lake Homes, Inc. v. State*, 48 Wn.(2d) 499, 294 P.(2d) 1113 (1956).

See also the numerous citations in *Haumesser v. Chelalis County*, 76 Wash. 570 at 574, 136 Pac. 1141 (1913), where although the facts were different the court stated that "Washington law" was as follows:

"it is the well-established doctrine that he who has the right to property and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of taxes. *Railroad Co. v. Price*, *supra*, 133 U.S. 496. 10 S.Ct. 341, L.Ed. 687."

For other decisions, see *Russell v. New Haven*, 51 Conn. 259 (1883); *Burbank v. Board of Assessors*, 27 So. 947 (La. 1900); *Norfolk v. J. W. Perry Co.*, 61 S.E. 867 (1908); *Hines Lumber Co. v. Lane County*, 258 P.(2d) 720 (Ore. 1952); and *Ex Parte Gaines*, 19 S.W. 602 (Ark. 1892); *Bentley v. Barton*, 41 Ohio St. 410 (1884). In *P.W.&B.R.Co. v. Appeal Tax Court*, 50 Md. 397 (1879) a railroad company leased land from a tax exempt city for a 99-year term. The court held (1) the lessee should be taxed on the land to the extent of its leasehold interest, and (2) directly upon the improvements erected by the lessee at their full value. The court stated:

"As to the improvements placed upon the two parcels leased from the city by the appellant, we fully concur with the court below, that they were placed upon the demised premises by the appellant for its own use and benefit, they were properly assessed to the appellant at their full assessable value."

In *Broadway and Fourth Ave. Realty Co. v. Louisville*, 197 S.W.(2d) 238 (Ky.), a realty company leased land from a tax exempt educational institution for 99 years. The court held the lessee should be taxed on the improvements erected by it as if it had title and full ownership.

*Outer Harbor, Dock & Wharf Co. v. Los Angeles County*, 193 Pac. 142 (Cal. App. 1920). The lessee constructed a wharf and warehouse on leased state lands and was properly taxed on the improvements as owner. See also *San Francisco v. McGinn*, 7 Pac. 187 (Cal.

1885), where the lease was but for 50 years. Compare *San Diego County v. Davis*, 33 P. (2d) 827 (Cal. 1934).

In *Percival v. Thurston County*, 14 Wash. 586, 45 Pac. 159 (1896) Percival had applied to the State for a lease of state tidelands. These lands, by Washington Constitution, could not be sold—only leased. He constructed a wharf, a large dock and a warehouse upon which the county imposed property taxes. He sought to enjoin the threatened sale of the improvements for failure to pay taxes. The injunction was denied, the court holding that these improvements were taxable.

We have no quarrel with the general and Washington rule that:

"In determining the worth of a leasehold the courts have universally held that it is the value of the term less the rent reserved." *In re Metropolitan Building Co.*, 144 Wash. 469 at p. 476, 258 Pac. 473 (1927)

*In all such Washington cases, however, the improvements will last beyond the term of the lease. The issues here were not there involved.*

Here, as shown by the Detail and Assessment sheets (R. 127, 129, 131) the taxes were assessed upon the beneficial ownership in the improvements pursuant to the *Offutt* decision. However, if the taxes were upon the leasehold and included as the measure of the value of the beneficial ownership, the full value of the improvements, the result would be the same and valid. Technical distinctions should not thwart justice.

*Further, there is not a scintilla of evidence in this record or in any court proceedings involved that the Re-*

spondent did not correctly value the interest of the Petitioners or that he did not utilize the methods they contend are correct. There is absolutely no evidence in the entire record to justify a statement that these Petitioners were taxed at a "higher rate" than "Wherry Act leaseholds" as stated by the United States Brief at pp. 11 and 16.

### 3. Appellate decisions on these housing projects

Every appellate court decision rendered as of this writing has held the state property tax applied to these identical housing projects.

Where title was clearly in the lessee, this has been used as an additional ground to support taxes. See *Fort Dix Apartment Corp. v. Borough and Sheridanville, Inc., v. Borough*, 125 F. Supp. 743 (1954), taxability affirmed on appeal, 225 F.(2d) 473 (1955) cert. denied, 351 U.S. 962, 100 L. Ed. 1483; *Meade Heights, Inc. v. Tax Commission*, 95 A.(2d) 280 (Md. 1953); *Gay v. Jamison*, 52 So.(2d) 117 (Fla. 1951); *Dayton Devel. Ft. Hamilton Corp. v. Boyland*, 133 N.Y.S. 821 (1954); *Conley Housing Corp. v. Coleman*, Sup. Ct. of Georgia, No. 19001 (Sept. 12, 1955), and *Offutt Housing Co. v. County of Sarpy*, *supra*.

Compare *United States v. Detroit*, 355 U.S. 466, 2 L. Ed.(2d) 424 (1957); and *United States v. Township of Muskegon*, 355 U.S. 484, L.Ed. (2d) 436 (1957).

### 4. Petitioner's Remedies

The brief of the United States (p. 25) urges that the Circuit Court below erred in remanding the cause for

proof of correct valuation. It states that Washington law does not permit this. This is *exactly* the procedure followed in *In re Metropolitan Building Co.*, 144 Wash. 469, 258 Pac. 473 (1927). There, the trial court held a leasehold had been incorrectly valued; heard evidence as to the correct valuation and reduced the assessed valuation—all of which was approved on appeal.

The various procedures which Petitioners are required to follow in their attack upon these taxes are set forth, *infra*. Washington follows general law in this regard. Injunctions are prohibited under R.C.W. 84.68.010 providing:

*"Injunctions prohibited — Exceptions.* Injunctions and restraining orders shall not be issued or granted to restrain the collection of any tax or part thereof, or the sale of any property for the nonpayment of any tax or part thereof, except in the following cases:

(1) Where the law under which the tax is imposed is void; and

(2) Where the property upon which the tax is imposed is exempt from taxation."

See *Casco Co. v. Thurston County*, 163 Wash. 666, 2 P. (2d) 677 (1931). The remedy is payment under protest and a suit to recover. This remedy is exclusive and constitutionally valid, *Snyder v. Marks*, C.I.R., 109 U.S. 189, 27 L.Ed. 901 (1883) and *Dodge v. Osborn*, C.I.R., 240 U.S. 118, 60 L.Ed. 557 (1916).

Since Petitioners attack "valuation" they are met head on by R.C.W. 84.68.070 providing:

*"Remedy exclusive—Exception.* Except as per-



mitted by this chapter, no action shall ever be brought or defense interposed attacking the validity of any tax, or portion thereof; *provided*, That this section shall not be construed as depriving the defendants in any tax foreclosure proceeding of any valid defense allowed by law to the tax sought to be foreclosed therein except defenses based upon alleged excessive valuations, levies, or taxes."

See *Western Machinery Exchange v. Grays Harbor County*, (*en banc*) 190 Wash. 447 at p. 452, 68 P.(2d) 613 (1937). This holding was modified by *Island County v. Calvin Phillips, Inc.*, 195 Wash. 265, 80 P.(2d) 840 (1938). This led to the enactment of the above statute, in its present status, in 1939.

There is now, in Washington, no question but that the defense of over-valuation is not available in a tax foreclosure proceeding. It is a tax foreclosure proceeding that we have here and which the District Court enjoined in a collateral condemnation action. *Anderson v. King County*, 18 Wn. (2d) 176, 138 P. (2d) 872 (1943).

*The Petitioners in the District Court did not even allege over-valuation, improper valuation, excessive valuation, or discrimination (R. 65, 67, 71). They alleged only that their leaseholds were never assessed.*

A tax on property is one of the oldest methods of raising revenue. Methods and procedures vary but little among the states. In Washington, as in most states:

"Personal property includes \* \* \* and all improvements upon lands the fee of which is vested in the United States, or in the state \* \* \*" R.C.W. 84.04.080.

The resident owner of property is required to:

"list all his personal property" R.C.W. 84.40.180 and deliver that list under oath to the Assessor.

"84.40.200 *Default listing of personalty—Statement of valuation to owner.* In all cases of failure to obtain a statement of personal property, from any cause, the assessor shall ascertain the amount and value of such property and assess the same at such amount as he believes to be the true value thereof. The assessor, in all cases of the assessment of personal property, shall deliver or mail to the person assessed, or to the person listing the property, a copy of the statement showing the valuation of the property so listed, which copy shall be signed by the assessor."

The Petitioners refused to comply with the law. They have submitted nothing on valuation to anyone—not even to the court. The penalty for refusing to list property with the assessor is a penalty of not more than \$2,000. R.C.W. 84.40.130.

The assessor is required to commence assessments by December 1st

"and complete his duties of listing and placing valuations on all property by May 31st of each year \* \* \*" R.C.W. 84.40.040.

He makes out a "Detail and Assessment List," R.C.W. 84.40.050 (R. 127, 129 and 131).

"The taxes assessed upon each item of personal property shall be a lien upon such personal property from and after the date upon which it is listed and valued by the County Assessor \* \* \*" R.C.W. 84.60.030.

The Detail and Assessment lists are then compiled by

the Assessor into permanent book form and on the first Monday in July these books are transmitted to the County Board of Equalization, R.C.W. 84.40.320.

The county Board meets, beginning the first Monday in July, to equalize all assessments on a county-wide basis, R.C.W. 84.48.010. "Equalization" is the process by which assessments as a whole are reviewed to determine whether they are relatively equal in all parts of the county and to adjust assessments to the same relative standard so no part of the county pays a disproportionate part of the tax, 3 Cooley on Taxation, p. 2389 (4th Ed.)

The assessor then corrects the assessment rolls in accordance with the changes made by the Board and transmits the corrected rolls to the State Board by the following August 1st, R.C.W. 84.48.040. The assessments are then equalized on a statewide basis for state tax purposes, R.C.W. 84.48.080.

The taxpayer can protest the valuation of his property before the County Board, R.C.W. 84.48.020. Both the taxpayer and the assessor have the right to appeal decisions of the County Board to the State Board, R.C.W. 84.08.130 and .140 and then to the courts, *Schneidmiller & Faires v. Farr*; 156 Wash. Dec. 906 (Adv. No. 27, Oct. 6, 1960).

The assessor then makes a final record of all errors, double assessments, etc., and files this record with the County Board of Equalization on the third Monday in November. The Board then makes such corrections as are necessary, R.C.W. 84.52.090. On December 15th, the

corrected tax rolls are certified by the Assessor to the County Auditor, R.C.W. 84.52.080.

The auditor, after making his record for audit purposes, on the first Monday in January next, certifies the tax rolls to the County Treasurer for collection, R.C.W. 84.56.010. The Treasurer then notifies each taxpayer of his tax, R.C.W. 84.56.050. The collection procedure begins the 15th of February. If taxes are not paid voluntarily, the Treasurer must commence distraint and sales procedures.

Following completion of the valuation-assessment procedure, the taxes are levied. The term "levy" is loosely used but strictly speaking, it means the laying of a tax in specific amounts against specific property, 3 *Cobley on Taxation*, p. 2043 *et seq.*; and *Black's Law Dict.* 3rd Ed.).

By the first of October the budgets of the county offices plus those of the various taxing districts within the county have been filed with the County Commissioners. These amounts cannot exceed the percentage (millage) rate allowed each taxing entity by law. The total millage cannot exceed 40 mills except for specially voted "excess levies") by constitutional prohibition, Wash. Const., Art. VII, § 2 (17th Amend.) and R.C.W. 84.52.050.

The assessor then, based upon the allowable budget expenditures, determines the percentage rate of all taxes against the property within the taxing district and extends these tax rates against the property on the tax rolls, R.C.W. 84.52.010. The tax rolls are then passed

upon by the County Commissioners at their October session, R.C.W. 84.52.030, and .040. These are then certified back to the assessor, R.C.W. 84.52.070.

The Petitioners here failed completely to comply with these procedures. They brought their litigation which they lost. They now collaterally attack those judicial decisions.

### **5. Omitted Property**

You will recall that each of the three corporations refused to list their property. Instead they sought misconceived court injunctions which prevented the assessor from listing the property. The taxing procedures were thus wrongfully delayed as the result of the actions of these corporations.

The assessor was enjoined by the state court in the Moses Lake matter and as a result he did not list and assess Larsonaire Homes and Larson Heights. He did so later and was enjoined.

When the case was ultimately won by Respondent and the taxes held valid and the injunction discharged, the assessor assessed the property for the back years by way of the omitted property statute, R.C.W. 84.40.080.

The omission of taxable property from the tax rolls wrongfully increases the tax burdens of others. This should be permitted neither by the good faith error of a public official, nor the effort of a taxpayer to avoid his fair share of the public burden. See *Florida Nat. Bank v. Simpson*, 59 So.(2d) 751, 33 A.L.R.(2d) 581 at 590 (Fla. 1952).

"Taxes are not cancelled and discharged by the failure of duty on the part of any tribunal or officer, legislative or administrative. Payment alone discharges the obligation \* \* \*."

Further:

"The owner of taxable property omitted from the tax rolls becomes liable for the tax thereon at the time the property ought to have been placed upon the rolls and this liability continues until the tax is discharged by payment." 51 Am. Jur., Taxation, p. 676

"Where property is assessed for back years, the general rule is that the rate of the tax as well as the valuation is to be determined as of the year when the property escaped taxation." 3 Cooley on Taxation, p. 2342 (4th Ed.)

In Washington, the valuation of the property is entered as of the omitted year in the detail and assessment list for the current year, R.C.W. 84.40.080. Placing the omitted property on the current year's rolls satisfies the due process requirement of notice and opportunity for hearing, *Winona & St. Peter Land Co. v. Minn.*, 159 U.S. 526 at 537, 40 L. Ed. 247 at 251 (1895).

As aptly stated in the *Winona* case:

"If a party interposes as a defense an omission of any of the things provided by law in relation to the assessment or levy of a tax, or of anything required by any office to be done prior to filing the list with the clerk, the burden is on him to show that such omission has resulted in prejudice to him and that the taxes have been partially, unfairly or unequally assessed. This relates, not to want of authority to levy the tax, but to some omission to do



or irregularity in doing the things required to be done in assessing or levying a tax otherwise valid." 159 U.S. at 537.

Further:

"And certainly, in justice or in reason, a party cannot complain that, when he objects to a tax on the ground of some omission or irregularity in matters of form, he is required to show that he was prejudiced." 159 U.S. at 537.

None of these tax-avoiding corporations has made, nor can they make, the slightest proof of prejudice to them.

"An owner cannot escape by contesting the right of assessors to impose the tax and by keeping the matter in litigation beyond the time fixed by law for making the assessment." 51 Am. Jur., p. 676 *supra*; *State ex rel. Taggart v. Holcomb*, 106 Pac. 1030 (Kan.).

It would be outright injustice to the people of Grant County to permit these taxpayers to utilize their wrongful injunctions and wrongful failure to list their property to escape their congressionally decreed duty to pay taxes. Yet this is the main tenet of their argument.

The validity of the taxes has been determined. The offsets should be determined as if no injunction had been in force, the taxpayers had filed their lists as required by law and the assessment and levy had followed their normal course.

## 6. Time of lien

As we see it, since (1) taxes are valid and (2) certain offsets are proper, the remaining question is whether the offset applies to 1957 taxes, assessed February, 1956—payable 1957.

Taxes in Washington become liens on personal property as of the time of assessment, R.C.W. 84.60.030; *Mills v. Thurston County*, 16 Wash. 378, 47 Pac. 759 (1897); *Phelan v. Smith*, 22 Wash. 397, 61 Pac. 31 (1900); *Ernst v. Guarantee Millwork, Inc.*, 200 Wash. 195, 93 P.(2d) 404 (1939); *P.U.D. No. 1 of Lewis County v. Pierce County*, 24 Wn.(2d) 563, 166 P.(2d) 933 (1946); and *State ex rel. Peoples Bank v. King County*, 36 Wn.(2d) 10, 216 P.(2d) 225 (1950).

This is the general rule, *United States v. Alabama*, 313 U.S. 274, 85 L. Ed 1327 (1941); *United States v. Sampsett*, 153 F.(2d) 731 (9th Cir. 1946); *People ex rel. Haveman v. Commissioners*, 104 U.S. 466, 26 L. Ed. 632 at 633 (1881); *County v. Drake* 41 N.W. 942 (Minn); *Wildberger v. Shaw*, 36 So. 599 (Miss); *Wood v. McCook Waterworks*, 97 Neb. at 217 and 220, 149 N.W. 417; and *Allen v. Bemis*, 108 A.(2d) 549 (N.H. 1954).

It is of no consequence that the property assessed becomes exempt prior to levy; the lien remains valid, see *Airbase Housing, Inc., v. Spokane County*, 156 Wash. Dec. 604 (Adv. No. 20, Aug. 25, 1960) overruling *Puget Sound Power & Light Co. v. Cowlitz County*, 38 Wn.(2d) 907, 234 P.(2d) 506 (1951) relied on by the Petitioners. This is the general rule, see 63 A.L.R. 1332.

In this instance, the 1957 taxes assessed upon Wherry projects would have become liens or "encumbrances" in the spring of 1956 prior to the June 15, 1956, date specified in Sec. 511 (42 U.S.C.A. § 1594 note). No question of exemption is involved. Section 511 merely provides for a deduction of monies from payment of the valid tax.

We have examined the taxing process in some detail to disclose its nature and the procedures which could have been and should have been followed by these Petitioners to assert their contentions as to improper valuations.

The effect of their failure to do so and their complete disregard of Washington laws should not be visited upon the other citizens of Grant County who for years now have been paying Petitioners' share of the expenses of government.

The government urges that Petitioners pay a higher tax than lessees of other property (Gov. Br. 22 *et seq.*) Petitioners imply (Br. 12) this and the court below (R. 355 note) assumes this. *There is absolutely no support for this in any record in any of the cases heretofore tried.*

Assume that Petitioners leased its 400 housing units, less a 5% vacancy factor, for \$100 each per month. This would equal a gross rental return of \$38,000 per month; \$456,000 per year; or \$10,900,000 for the 25 years necessary to pay off the mortgage, which at 4% interest, would require a total repayment of \$1,854,000.

These will be the issues when Petitioners and the United States contest the value of the property for condemnation purposes. These should have been the issues where Petitioners assert the valuation of their property is discriminatively high.

## **Issues Presented in Condemnation Action**

### **(Three Judge Court)**

Washington Constitutional law, case law and statute law all specifically prohibit tax discrimination. So does our Federal Constitution. Like any other justiciable issue, a discriminatory tax may be attacked by a proper procedure before a proper forum.

Discriminatory valuation is merely another term for excessive valuation—that is, a valuation of Petitioners' property which exceeds that of other and similar property within the taxing enclave. This, in Washington as in most states, can only be attacked by payment of the tax and suit for refund. Of all the state remedies available to these Petitioners to assert their claims, none has been followed. Even yet there is neither allegation nor intimation that the state remedies are inadequate.

Respondent County was brought into the condemnation action below in the District Court by an injunction prohibiting the county treasurer from collecting state and county taxes. This type of injunction requires a three-judge court pursuant to 28 U.S.C.A. § 2281 providing:

“An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the applica-

tion therefor is heard and determined by a district court of three judges under section 2284 of this title."

This prohibition applies to actions seeking to enjoin the collection of state taxes, see *Query v. United States*, 316 U.S. 486, 86 L. Ed. 1616 at p. 1620 (1942):

"Here a substantial charge has been made that a state statute as applied to the complainants violates the constitution. Under such circumstances, we have held that relief in the form of an injunction can be afforded only by a three-judge court pursuant to section 266 [citing cases]".

A "state" tax as well as a county tax is here involved, see *Moses Lake Homes v. Grant County*, 49 Wn.(2d) 182, *supra*, at p. 184:

"In our opinion, the complaint in intervention alleged a substantial interest in the pending litigation by reason of the state's two-mill tax."

Therefore, this action is not within the exception of *Ex parte Public National Bank*, 278 U.S. 101, 73 L. Ed. 202 (1928) holding at section 266, the predecessor of 28 U.S.C.A. § 2281, did not apply to restrain the enforcement of a city tax statute by a city official. See also *Stratton v. St. Louis Southwest R. Co.*, 282 U.S. 10, 75 L. Ed. 135 (193) and *Chicago G.R.W. Co. v. Kendall*, 266 U.S. 94, 69 L. Ed. 183 (1924). Three-judge courts sat in the following cases: *Chicago & Great Western Co. v. Kendall*, *supra*, and *Oklahoma Natural Gas Co. v. Russell*, 261 U.S. 290, 67 L. Ed. 659 (1922).

It would therefore appear clear that a condemnation action is no forum to press the constitutional validity of a state tax. The Petitioners have and had clear and ade-

quate remedies in the state courts which they have already used to the fullest. The only remedy available to them which they did not use was their complete and utter failure to seek review by this court.

### Res Judicata

The Circuit Court held (R. 348):

"A judgment upon the merits in a state court action is *res judicata* in a subsequent federal court action where the parties and subject matter are the same. This is true not only with regard to matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end, *Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470."

Certiorari to this Court is a remedy the Petitioner, Moses Lake Homes, Inc., did not seek. Whether this Court would, in its discretion, grant a review of the state court action, does not alter the doctrine of *res judicata*. We note however that Petitioner sought and obtained a review of the Circuit Court decision by this Court based upon the opinion in *Moses Lake Homes, Inc., v. Grant County*, 51 Wn.(2d) 285, 317 P.(2d) 1069 (1957).

We do not follow Petitioner's argument that this Court would "probably not" grant Certiorari and therefore *res judicata* is no bar. Even were *res judicata* affected by the failure of this Court to grant a review, the identical types of issues were presented and review granted in this Court's review of State Court action in the *Offutt* case, *supra*; in *Detroit v. Murray Corp.*, 355



U.S. 495, 2 L.Ed.(2d) 411 (1958) and their companion cases; as well in *Phillips v. Dumas School Dist.*, 361 U.S. 376, 4 L.Ed.(2d) 384 (1960).

The obvious reason Petitioner did not seek Certiorari from the State Supreme Court decision was the decision of this Court in the *Offutt case*. Petitioner in one breath urges that the State Court decision proves an unconstitutional discrimination and then, in the next breath, argues that the decision was based upon adequate non-federal grounds which this Court would not have reviewed. If either facet of its logic is correct, it is out of court.

Further, Petitioners, in their Petition for Certiorari, or in their brief, do not challenge the Circuit Court's holding on the *res judicata* issue. They thus apparently accept the ruling of the Circuit Court on that issue.

The United States alleges, without support, that Nebraska tax law, Neb. Rev. Stat. §§ 77-1209 is different from Washington tax law. By Washington statutes, R.C.W. 84.04.080, personal property is defined for tax purposes to include

\*\*\* all improvements, the fee of which is still vested in the United States or the State; \*\*\*

The purpose of this section is to prevent the application of the common law doctrine of accession. The improvement therefore remains taxable. This is the statute involved in *Percival v. Thurston County, supra*, and is the reason for the decision. This is also the Nebraska law.

## CONCLUSION

These conclusions appear obvious:

(1) The tax validity issue should be determined as if condemnation were not involved;

(2) The validity of the taxes should be determined as if the taxes had been properly, timely, and regularly levied and assessed without the hindrance of lawsuits, injunctions, and threats thereof;

(3) The Washington court is not so far out of step with general law and its own Constitution as Petitioners allege;

(4) The record is completely devoid of any showing that

(a) Any of the Petitioners followed the proper steps to contest the alleged excessive valuation of their property;

(b) The valuation of their property was not correct; and

(c) The valuation of their property exceeded that of similar property within the county;

(5) *Res judicata* bars any contest of the validity of the 1955, 1956 and 1957 taxes, plus interest assessed against Moses Lake Homes, Inc.

Respectfully submitted,

PAUL A. KLASSEN, JR.

Prosecuting Attorney

Grant County, Washington

FELIX & ABEL and

JENNINGS P. FELIX

Special Counsel

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FILE COPY

Office-Supreme Court, U.S.

FILED

MAR 22 1961

JAMES R. BROWNING, Clerk

No. 212

**In the Supreme Court of the  
United States**

OCTOBER TERM 1960

**MOSES LAKE HOMES, INC., LARSONAIRE HOMES, INC.  
and LARSON HEIGHTS, INC.**

*Petitioners,*

vs.

**GRANT COUNTY,**

*Respondent.*

**On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit**

**REPLY BRIEF FOR PETITIONERS**

**LYCETTE, DIAMOND & SYLVESTER  
AND LYLE L. IVERSEN**

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**In the Supreme Court of the  
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MOSES LAKE HOMES, INC., LARSONAIRE HOMES, INC.,  
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On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

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**REPLY BRIEF FOR PETITIONERS**

---

**THE ISSUE IN THIS CASE IS WHETHER THE  
FEDERAL COURT WILL LEND ITS ASSISTANCE  
TO ENFORCE A DISCRIMINATORY  
TAX EXACTION**

Both the trial court and the Circuit Court of Appeals have found specifically that the State of Washington has undertaken to tax the leasehold on a different and higher basis than the amount of taxes and assessments on other similar property of similar value. (R. 155, R. 355). This court in *Comstock v. International Investors*, 335 U. S. 211, held such findings virtually conclusive, saying:

"A seasoned and wise rule of this court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error."

To the same effect see *Corn Products Refining Co. v. Commissioner*, 350 U. S. 46, 51, 100 L. Ed. 29. Respondent undertakes, on page 6 of its brief, to say that the mortgage encumbrances must have been considered, contrary to the opinion of the Circuit Court. This is the first time that contention has been advanced and it is contrary to respondent's own statement made in response to a request for admission. This matter was before the court upon the facts stipulated and admitted. Petitioner, by its request for admission 13, (R. 102) asked respondent to admit as follows:

"The assessor for Grant County, in fixing the assessed values of the properties herein, based his evaluations upon 50% of the market value of the physical improvements on the respective properties held by the respective defendants herein, without reference to the market value of the leaseholds of the respective defendants, and without reference to mortgage encumbrances against leaseholds."

Respondent's answer to that request for admissions is as follows (R. 141):

#### VIII.

"As to item No. 13, the assessor admits that the assessed valuations were made without reference to the mortgage encumbrances, but that the valuation was fixed in considering a similar ratio of similar properties assessed within Grant County, taking into consideration the other items which would affect the value of the property."

There can be no doubt from the evidence that the burdens against the property were not considered.

The Washington Statute, § 84.40.030, of the Revised Code of Washington, provides:

"Taxable leasehold estates shall be valued at such price as they would bring at a fair voluntary sale for cash."

At no time has it been contended that the State was undertaking to tax this leasehold on any basis other than on the value of the physical improvements. That is the basis the Supreme Court of Washington said that Wherry Act leaseholds were to be taxed, in *Moses Lake Homes, Inc. vs. Grant County*, 51 Wn. (2d), 285, 317 P.(2d) 1069. The formula for taxing all other leaseholds, which was announced by the Washington Supreme Court repeatedly, is that for taxation purposes leaseholds must be measured by their-market value, considered in the light of their burdens and benefits. *Metropolitan Building Co. vs. King County*, 72 Wash. 47, 129 Pac. 883; *Metropolitan Building Co. vs. King County*, 62 Wash. 409, 113 Pac. 1114; *Metropolitan Building Co. vs. King County*, 64 Wash. 615, 117 Pac. 495; 258 Pac. 473, affirmed, *Bellingham Commercial Hotel Co. v. Whatcom County*, 190 Wash. 609, 613, 70 P.(2d) 301; *Dexter Horton Bldg. Co. v. King County*, 10 Wn. (2d) 186, 116 P.(2d) 507. Here neither the cash market value of a leasehold nor burdens and benefits were considered.

Respondent, on page 7 of its brief, makes an excursion outside of the record to say that the action brought with respect to taxes assessed in 1952 became a final judgment against petitioner and that petitioner had paid these very taxes. This statement outside of the record is not correct, and omits

the fact that the action was terminated by compromise by which the county agreed thereafter to tax only the market value of the leasehold and kept its promise only through the following year with respect to taxes assessed in 1953 for 1954, which taxes were levied and paid on the same basis as other leaseholds are taxed in the state and not upon the basis sought to be applied here.

The case of *Moses Lake Homes, Inc. vs. Grant County*, 51 Wn. (2d) 285, 317 P.(2d) 1069, does not deal with any specific taxes in any particular amounts and it was merely declaratory of what the Supreme Court of Washington held to be the applicable principle of law, and that was that a Wherry Act leasehold would be taxed at the full value of the improvements on the property. The court left no room for the application of the burdens and benefits formula which it has consistently applied in cases involving leases from the state, and left no room for the ascertainment of the cash market value of the leasehold, as such. Thus, the Supreme Court of Washington apparently indicated that the statute with respect to the method of taxing leaseholds, C.W. 84.40.030, was applicable only to other leaseholds than Wherry Act leaseholds.

In the case of *Metropolitan Building Co. vs. King County*, 62 Wash. 409, the Washington Supreme Court expressly rejected the idea that a leasehold could be assessed upon the value of the improvements, in a case involving a lease from the state. The court said on page 412:

"Therefore, an assessment based upon the value of the improvements or the amount invested therein was erroneous and entitles respondent to relief."

Thus, the identical matter which the Washington Supreme Court, in the case of *Moses Lake Homes vs. Grant County*, 51 Wn. (2d) 285, 317 P.(2d) 1069, held with respect to a Wherry Act leasehold to be the basis of the assessment had been held not to be the basis for an assessment with respect to leaseholds from the state. The same case, *Metropolitan Building Co. vs. King County*, 62 Wash. 409, 113 Pac. 1114, also answers another point raised in respondent's brief, with respect to whether the court can set aside a tax that is levied on a wrong basis. The court there said:

" . . . Where there is no basis in law for the assessment, courts have always stood ready to correct the wrong. It is fundamental that the powers to tax can only be exercised under statute defining its limitations; and if the law be not followed, the owner is not to be left without remedy."

In this case, the law of the state has been declared by the state Supreme Court to be such that the assessor had no choice except to apply the law and to assess a Wherry Act leasehold without reference to its burdens and benefits and without reference to the market value of the leasehold as such, but solely by determining the value of the physical improvements. That is precisely what the Washington Supreme Court in the *Metropolitan Building Co.* case above cited had held could not be done with respect to other leaseholds. This interpretation of the Washington law made unavailing any administrative proceedings to correct the discriminatory actions of the assessor who merely applied the law as declared by the Washington Supreme Court.

In the case of *Metropolitan Building Co. vs. King County*, 64 Wash. 615, 117 Pac. 495, the Washington



Supreme Court pointed out that in determining the valuation of a leasehold, the current income and prospects of the leasehold as an investment were prime considerations in taxing the leasehold at the price that it would bring at a fair voluntary sale for cash. Thus the value of the improvements, the court pointed out, could not establish the value of the leasehold because at the particular time no one would pay for the leasehold, burdened as it was with lease obligations and debts, anything like the valuation of the improvements. That case illustrates very well how the state, with respect to Wherry Act leaseholds, has departed from the concept established for taxing state leaseholds or private leaseholds.

In the case of *In Re Metropolitan Building Co.*, 144 Wash. 469, 258 Pac. 473, the court pointed out, in discussing the previous *Metropolitan Building Co.* cases:

"At the time of each assessment heretofore involved, the operation showed a net loss, now they show a profit, but of how much is seriously in dispute and presents a vital question in the present case."

The court went on to say:

"The first of the former cases settled the law, which is still applicable. It is there said:

" 'We are bound by the statute, therefore, to determine the value of the leasehold as personal property. In determining the worth of a leasehold the courts have universally held that it is the value of the term less the rent reserved. The value of the term is fixed with reference to present as well as prospective conditions; not speculative, but actual; or, to state the proposition more aptly, its value in money to



one who desires to sell but who is under no necessity for selling, and to one who is desirous of buying but is under no compulsion to do so. ....

" This rule of value has been applied in condemnation cases, where it is necessary to determine the immediate value of leasehold property as a basis for the assessment of damages. *Corrigan v. Chicago*, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212; *In re New York & Brooklyn Bridge*, 4 N. Y. Supp. 222; *Pennsylvania R. Co. vs. Eby*, 107 Pa. St. 166. If the real property upon which the buildings are erected were owned by a private individual, we apprehend that the question raised in this case would not have occurred; for, unless controlled by the contract of the parties, the real property would be assessed to the owner of the fee, while the leasehold would be assessed to the lessee. The fact that the fee is in the people of the State of Washington does not alter the rule.

" The fallacy of appellant's position may be readily shown by suggesting that, in the final years of the term, if their theory be followed, respondent would pay only a nominal tax, or be burdened by a tax so onerous as to amount to confiscation. For if the assessment be made with reference to the time the lease had yet to run, the assessed value would be out of all proportion to its value. If, on the other hand, if respondent were compelled to pay upon the amount of its investment, the tax would be grossly excessive. Whereas, under the rule as we find it to be, the present worth of the lease from year to year, considering also the term, fixes a criterion of value easily ascertainable and just to both parties. Therefore, an assessment based upon the value of the improvements or the amount invested therein was erroneous, and entitles respondent to relief. "

This is far different from the criterion set by the Washington Supreme Court for Wherry Housing projects, where the value of the physical property only is considered, and is far different from the practice followed by the county assessor in this case, where the burdens were entirely disregarded. There can be no question that the trial court and the Circuit Court of Appeals were correct in finding that this Wherry Act leasehold had been taxed at a different and higher basis than other similar property in the state is taxed.

Respondent's argument that the situation should be different here because the 75 year lease would exceed the life of the improvements is not based upon any finding of the court in this case, nor upon any evidence. The only evidence on this point comes from the request for admissions and answers thereto. Respondent sought, (R. 89) to secure an admission that the life expectancy of the buildings would not exceed 60 years. In response thereto, petitioner answered (R. 94):

"With respect to requests 5, 6 and 7, these defendants cannot admit that the life expectancy of the buildings will not exceed 60 years, since the terms of the lease of each of these defendants provided for replacement reserves which would have resulted in maintenance of the buildings in perpetuity."

However, the Washington Supreme Court in its treatment of other leaseholds has not made any distinction as to the method of taxing those that are long or short. Thus, the *Metropolitan Building Co.* cases previously referred to were 50 year leases from the state, being substantially the life of the buildings, and it was in the case of those long term

leases that the Washington law was established to the effect that taxation must be upon the basis of the market value of the leaseholds considered in the light of its burdens and benefits.

With respect to other leases, the law of Washington is that for tax purposes, no matter how long the lease runs, it is still a leasehold and does not constitute ownership. Thus, in *State ex rel. Hellar vs. Jackson*, 82 Wash. 351, 144 Pac. 48, the Washington Supreme Court declared the law to be that even a lease for 999 years did not constitute ownership. The court said:

"It is also argued by the relator that, inasmuch as the leases from the Northern Pacific Railway Company to the Oregon-Washington Railroad & Navigation Company and the Great Northern Railway Company extend for a period of 999 years, that these lessees, in substance, own an interest in the railway. As a matter of fact, this contention may be correct. But, as a matter of law, the lessees do not own the fee and are not owners of the road. They are simply lessees for a given time."

The point is that by the law of Washington, in taxing all leaseholds other than Wherry Housing Act leaseholds, irrespective of the length of the term, the criterion is always the same, and it is only with respect to Wherry Act leaseholds that the value of the physical improvements is taken as the value of the leasehold.

Respondent's brief undertakes to argue that there is no exemption from the state taxation because of the fact that these improvements are on federal lands. We do not make any such contention. We merely contend that in such taxation the leaseholds must be treated the same as other leaseholds

would be treated, and that the federal court should not give any aid to discriminatory taxation of a leasehold from the federal government.

Respondent cites the statutes relative to taxation in the state of Washington and makes the statement that the petitioners refused to comply with the law in regard to listing their personalty. There is nothing in the record to this effect and petitioners do not admit that there was any refusal to comply with the law.

On page 32 of respondent's brief, the argument is made that the county was brought into the condemnation proceedings by an injunction proceeding, and that this would require a three judge court. The fallacy of this argument is that the injunction proceeding instituted by the United States was not to prevent the collection of taxes but to prevent the attempted sale by the county of government property, namely the physical buildings and improvements upon a military base.

The attempted remedy, which was restrained by the government, was not an attempt to sell the *leasehold* but an attempt to sell government owned buildings (R. 133, R. 137, R. 139). The government had, at the time of issuing the restraining order, actually taken even the leasehold by declaration of taking (R. 59). This was no challenge to the constitutionality of the state law. There is no state law to the effect that government property can be sold.

This matter was actually brought before the court when Grant County petitioned the United States District Court to pay it the amount of the claimed taxes from the deposit of estimated compensation (R. 72). The County petitioned the court to direct the payment to it of an amount in excess

of the deposit of estimated compensation to the owner (R. 83). It was the application of respondent to the federal court for assistance in collecting the discriminatory taxes that initiated the portion of the proceedings which was the subject of the appeal to the Ninth Circuit Court, which resulted in petition for review by this court. It is not necessary to have any three judge court to pass upon the question of whether the federal court will assist a state in discriminating against a leasehold from the federal government.

The issue of the injunction is not before this court, and it was not before the Circuit Court of Appeals. That matter was handled by a stipulation between government counsel and counsel for respondents (R. 75), and the order granting preliminary injunction (R. 76) was entered in a proceeding in which petitioners were not even involved, and it was solely between respondent and the government. No appeal was taken from the order granting that injunction and no order under rule 54-B was entered permitting an appeal with respect to that injunction, and there is nothing before this court with respect thereto.

This court should hold the discriminatory taxes not collectible in the federal courts. It should not have the federal courts undertake to reassess or evaluate the properties, since that is a function reserved by the Washington Constitution, Article XI, Sec. 12, to the county authorities. Neither the courts, or any other agency, may usurp or exercise that function. *State ex rel State Tax Commission v. Redd*, 166 Wash. 132, 6 P(2d) 619.

**CONCLUSIONS**

The state of Washington has undertaken to tax these leaseholds from the federal government on a basis different and higher than when it taxes leaseholds from the state or from private individuals. The federal courts should not lend their assistance to discriminatory treatment of federal leaseholds.

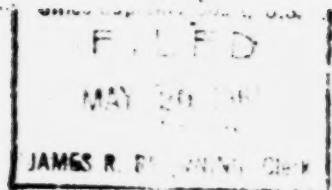
*Respectfully submitted,*

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**PETITION FOR REHEARING**

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**PETITION FOR REHEARING**

---

I.

**THERE IS A COMPLETE LACK OF EVIDENCE  
TO SUPPORT THE COURT'S FINDING  
OF DISCRIMINATION**

The opinion of the Court assumes that Grant County has valued Petitioner's leaseholds higher than other leaseholds in Grant County. This Grant County denies. There is no such allegation in the pleadings and no evidence in support of such a conclusion.

The Circuit Court did not attempt to "assess taxes" or instruct the District Court to do so (Slipsheet p. 8). The Petitioners were merely permitted to supply, if they could, the deficiencies in their proof. No trial occurred. The only evidence presented were the allegations of the Pleadings, plus the demands for admissions by each party, many of which were denied (Tr. 88, 94.

100, 104). Courts, and particularly this Court, should not be asked to base decisions upon surmise and conjecture as to what the evidence might show.

If, in order to decide this case, we must speculate, we submit that the only evidence of value before the Court is that Grant County assessed the property far *lower* than it should have. Section 84.40.030 of the Revised Code of Washington and the 17th Amendment to the Washington Constitution require that all property shall be assessed 50% of its fair value. A comparison of assessed values to the mortgages demonstrates the fallacy of assuming that the amount of the mortgage loans were included in the assessment of valuation. As the Court apparently concludes these are F.H.A. insured loans (Tr. 81) and the loan, by 12 U.S.C.A. § 1713(c) (2) (P. Supp.) may not exceed 90% of the value of the property. 90% is the maximum loan-to-value ratio, 12 U.S.C.A. § 1709(a) (P. Supp.).

| Lessee                    | Value                  | Loan                    | Actual Value<br>if Loan-to-<br>Value<br>Ratio is 90% |
|---------------------------|------------------------|-------------------------|--|
| Moses Lake<br>Homes, Inc. | \$500,000<br>(Tr. 128) | \$3,236,000<br>(Tr. 89) | \$3,595,555  |
| Larsonaire<br>Homes, Inc. | \$100,000<br>(Tr. 121) | \$1,782,000<br>(Tr. 89) | \$1,980,000  |
| Larson Heights<br>Inc.    | \$100,000<br>(Tr. 128) | \$1,600,000<br>(Tr. 89) | \$1,777,777  |

An instrumentality of the United States has already determined the actual value of these properties to be not less than the figures in the right column above. The mortgage amounts have been, of course, diminished by payments, the amount of which we do not know. Thus,



if, the Petitioners received maximum loans, Moses Lake Homes, Inc. was either assessed at 14% of its full value; Larsonaire Homes, Inc. at approximately 5%; and Larson Heights, Inc. at approximately 6% of its value. This was either in violation of Washington law or the assessor *did consider the benefits and burdens contrary to the assumption of the Court*. If discrimination existed, it appears to be in favor of rather than against these Petitioners. Further, if the loan-to-value ratio were less than 90%, the actual value of the property would be higher.

Remember, these assessments were "Default Assessments," made by the assessor because the Petitioners refused, in violation of law, to list and value their property as required by Sections 84.40.180 and 84.40.200 of the Revised Code of Washington. The Petitioners submitted nothing to the assessor to permit him to accurately determine valuation. They did not question his valuation before the County Board of Equalization pursuant to Section 84.48.020 of the Revised Code of Washington. They did not allege over-valuation, excessiveness of tax or discrimination in the Federal District Court, and they have presented no evidence that the assessed valuation is not the true valuation. Petitioners, in what would be their "Complaint," allege only that this property had never been assessed or levied upon (see para. 4 of the Petitioners for the Payment of Money, Tr. 66, 67-69, 70-71). If discriminatory valuation had been alleged in the trial court, Grant County, even though the burden of proof was not upon it, would have at least had the opportunity to meet these factual

issues. Discriminatory taxation was not raised by Petitioners either in their Specifications of Error in their Opening Brief (p. 8) in the Circuit Court or in their briefs as Cross-Appellees. With all respect, we submit Justice is ill-served when a taxpayer can profit by his unlawful refusal to list and value his property and win a lawsuit by his failure to allege and to prove the facts necessary to recovery.

The Circuit Court gave the Petitioners the opportunity to prove that the default assessment was excessive. Grant County did not seek Certiorari because it is confident that trial on the merits would demonstrate that the assessment is neither excessive nor discriminatory.

## II.

### DOES WASHINGTON DISCRIMINATE AGAINST FEDERAL LESSEES?

This Court finds that the Washington Court would discriminate against Wherry Act leaseholds because the opinion of the Washington Court in *Moses Lake Homes, Inc. v. Grant County*, 51 Wn.(2d) 285, 317 P. (2d) 1069 (1957), does not discuss the *Metropolitan* case, cited at p. 6 of the slipsheet opinion. Our contention before that Court and here was that the *Metropolitan* cases were not applicable because in those cases, the improvements would last beyond the length of the lease. In fact, in those cases, many of the improvements had been constructed prior to the lease. In the case before us, the improvements were placed upon the property by

the lessee after the lease began and would be gone when the landlord received the property back.

This, we submitted, is quite an obvious and important difference — it is the identical factor that this Court relied upon in *Offutt Housing Co. v. Sarpy County*, 351 U.S. 253, 100 L.ed.1151 (1955). The State decision is a clear mandate to the Washington taxing officials to assess all similar leases, whether governmental or private, in a like manner. ■

In the absence of clear language of the Washington Supreme Court that it was oblivious to the unconstitutional discrimination that this Court finds obvious, we suggest that both accuracy and propriety require this Court to instruct or request the Washington Court to clarify its position. Discrimination should not be easily presumed.

If any inconsistency exists between two decisions of the same court, the older case must be held to be overruled by the later, *Puget Mill v. Kerry*, 183 Wash. 542 at 559, 49 P.(2d) 57 (1935) and see also 14 Am. Jur. 283.

On *Wells v. City of Savannah*, 181 U.S. 531, 45 L.ed. 986 (1901), private persons had purchased perpetual leaseholds from the City of Savannah, Georgia, in 1790. The City attempted to tax the property by ordinance of 1878. This Court quoted with approval the opinion of the Georgia Supreme Court as follows:

“The value of property consists in its use, and he who owns the use forever, though it be on condition subsequent, is the true owner of the property for the time being. This holds equally of a city lot or of all the land in the world. Where taxation is *ad valor-*

em values are the ultimate objects of taxation, and they to whom the values belong should pay the taxes.

\* \* \*

"The corporeal property in such a case is at the direct risk of the purchaser; he alone sustains the losses of depreciation in value, and he alone takes the benefit of appreciation. The vendor risks only the fixed rent or the fixed purchase money, and neither of these will ever become more or less by anything which may happen to the premises. Only his security, not his property, will be affected thereby."

The importance of the *Wells* decision is that it involved leasehold property taxed at full value and that it was cited and relied upon by the Washington Court which quoted extensively from the Georgia Supreme Court opinion, as did this Court, in *Washington Iron Works Co. v. King County*, 20 Wash. 150, 54 Pac. 1004 (1898). the Washington Court stated:

"Tidelands held under contracts of purchase such as appellant had, are in the possession, use, occupation and enjoyment of private owners. They are no longer a part of the public domain of the state, but have been segregated from it. In equity, appellants are the owners, possessing a real and substantial interest, which they can assign, transfer and dispose of as they choose; and the state cannot deprive them of this right. The term 'property', as applied to land, comprehends every species of title, inchoate or complete. It is sufficient to embrace those rights which are executory as well as those which are executed: *Soulard vs. U.S.*, 4 Pet. 511, *Puget Sound Agricultural Co. vs. Pierce County*, 1 Wash. T. 159. The taxing power reaches

everything within the state which can be denominated property. It may be made to embrace all equitable credits of whatever description they may be. *Carroll vs. Perry*, 4 McLean 25. The naked legal title is in the state, but for one purpose only — to secure the unpaid purchase price, *Townsen vs. Wilson*, 9 Pa.St. 270. The interest of the state is that of an equitable mortgagee."

The Court then stated at 20 Wash. 154:

"Relatively to the question of taxation, it makes no substantial difference whether the estate or property of *beneficial* owners be classed as realty or personalty; whatever property of either kind belongs to them is taxable *ad valorem*." (Emphasis supplied)

"Substantially the same views are expressed in *Stockdale v. Treasurer*, 12 Iowa 536; *Logan v. Commissioners*, 51 Kansas 747 (33 Pac.603); *Edgington v. Cook*, 32 Nebraska 551 (49 N.W.369); *Prescott v. Beattie*, 17 Kansas 320; *Oswald v. Hallowell*, 50 Kansas 154."

In *Rabel v. Seattle*, 44 Wash. 482, 87 Pac. 520 (1906); and *Trimble v. Seattle*, 64 Wash. 102 Pac. 647 (1911) affirmed 231 U.S. 683, 58 L.ed. 435, (and see the annotations in 23 A.L.R. 248); the Washington Court held that the leasehold interest of a lessee of state property was taxable to the full value of the local improvement insofar as the leasehold is benefitted by the improvement.

The *Rabel*, *Trimble* and *Washington Iron Works* cases are the natural precursors of the State Court decision in *Moses Lake*. See also 3 Cooley on Taxation, § 1157 (1924).

"Improvements removable by the tenant at the end of the term are taxable to him and not the landlord." 2 Cooley on Taxation, § 593, p. 1268.

Why should improvements completely used up by the tenant before the end of the term be treated differently.

If our analysis of Washington tax law be questioned, we would submit that *Moses Lake* is so obtuse that this Court should certify the issue to them for decision.

### III.

#### RES JUDICATA

The opinion of this Court states (slip sheet pp. 8-9):

"Nor is there any merit in respondent's contention that the opinion and judgment of the Supreme Court of Washington in the *Moses Lake* case, *supra*, is *res judicata* of the County's tax claims against the Moses Lake leasehold for at least the years 1955 and 1956. This is so because no tax whatever had then been assessed and levied against the Moses Lake leasehold, and hence no issue of discrimination was or could have been presented and adjudicated in that case."

The validity of the 1955 taxes (and taxes for "all subsequent years") was the *specific issue* in the *Moses Lake* case.

That action was brought by this Petitioner, Moses Lake Homes, Inc., against this Respondent, Grant County, to enjoin the levy and collection of 1955 taxes and taxes for all subsequent years upon this property, on the grounds that the tax offended the Federal Constitution. Whether the tax was against the leasehold or the improvements themselves make no difference—it was



the very tax involved herein. *Res judicata* is a rule of substantive law and applies to both federal and state taxes. In *Tait v. Western Maryland R.Co.*, 289 U.S. 620 at 624, 77 L.ed. 1405 at 1408 (1933) this Court stated:

"This court has repeatedly applied the doctrine of *res judicata* in actions concerning state taxes, holding the parties concluded in a suit for one year's tax as to the right or question adjudicated by a former judgment respecting the tax of an earlier year. [citing cases]"

The doctrine applies to issues which were and which could have been litigated. *Res judicata* does not become inapplicable because a different argument or theory is advanced in the subsequent case, *Lenninger v. C.I.R.*, 86 F.(2d) 791 (6 Cir. 1936) affirming 29 B.T.A. 874 (1934).

## CONCLUSION

### I.

The Court has erred in assuming, without evidence, that a fact is true. The very least that should be required of one who asserts discrimination is that he prove it by competent evidence. He should not gain a profit because he refused to obey state tax laws.

### II.

This Court disagrees with what we consider the correct analysis of Washington tax law and the State Court's opinion in the *Moses Lake*. We presented the matter to that Court and feel our conclusions to be more accurate. However, it is clear that the opinion is unclear. The citizens of Grant County should not be penalized because of a lack of clarity. In such a case, the fair

thing to do is certify the question to the Court to which the decision belongs. Procedural limitations, if any, should not bar the effort to obtain a truly correct decision on Washington law.

### III.

The issue of the validity of the 1955 taxes was conclusively determined by the State Court judgment even though that judgment may have been in error. The Petitioners also specifically placed in issue before the State Court the validity of the taxes "for all subsequent years." This Court, by collateral attack, reversed the Washington Court's judgment. We submit this is manifestly improper unless this Court is to overrule all those of its previous decisions upholding the *res judicata* as a rule of law.

Respectfully submitted,

JENNINGS P. FELIX

*Special Counsel for Grant County*

**CERTIFICATE**

I, Jennings P. Felix, of counsel for Respondent, Grant County, Washington, do hereby certify, pursuant to Supreme Court Rule 58, that I am a member of the Bar of this Court and that this Petition for Rehearing is presented in good faith and not for delay.

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JENNINGS P. FELIX,<sup>sr</sup>

*Of Counsel for Grant County*

# SUPREME COURT OF THE UNITED STATES

No. 212.—OCTOBER TERM, 1960.

Moses Lake Homes, Inc., Lar-  
sonaire Homes, Inc., and  
Larson Heights, Inc., Peti-  
tioners,

v.

Grant County.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Ninth Circuit.

[April 17, 1961.]

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

Among their various contentions, petitioners sought our writ of certiorari on the ground that, although finding that the State of Washington had discriminatorily, and therefore unconstitutionally, valued and taxed their federal-Wherry Act leaseholds, the Court of Appeals for the Ninth Circuit, nevertheless, sustained and enforced those taxes. 264 F. 2d 502. We granted the writ, limited to that question. 364 U. S. 814. Understanding of our decision will require a brief statement of the relevant facts of the case.

Acting pursuant to the provisions of §§ 801 to 809 of Title VIII of the National Housing Act (12 U. S. C. (1958 ed.) §§ 1748, 1748a to h-1), the Secretary of the Air Force, on behalf of the United States, entered into a separate lease, with each of Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., Washington corporations, demising, in each instance, a particularly described tract of land, within the Larson Air Force Base in Grant County, Washington, for a term of 75 years, unless sooner terminated by the Government.

## 2 MOSES LAKE HOMES v. GRANT COUNTY.

for use as a housing project at a nominal rental of \$100 per year.<sup>1</sup>

The leases were on the same form, and each bound the lessee to erect on its leasehold a described housing project, and to maintain and operate it throughout the life of the lease. Each lease contemplated and provided that the lessee would raise the money necessary to construct the project by an F. H. A. insured mortgage loan on its leasehold and the improvements, to be serviced and amortized by the lessee out of its rents from the housing units, which were to be rented at such rates and to such military and civilian personnel as the Commanding Officer of the air base might designate. The leases further provided that the buildings and improvements, "as completed," would become the property of the United States and so remain, regardless of any termination of the lease, without further compensation to the lessee.

With the proceeds of F. H. A. insured mortgage loans on their respective leaseholds and the improvements, aggregating more than \$6,000,000, the lessees erected the respective housing projects and undertook their management and operation as agreed in the leases.

In June 1954, the Grant County assessor placed the Moses Lake leasehold on his assessment list for taxation in the year 1955, but he did not then levy any tax against it. Moses Lake promptly sued for and obtained a decree in the Superior Court of the State enjoining the County from levying *any taxes* on its leasehold for the year 1955 and thereafter. Upon the County's appeal, the Supreme Court of Washington, reversed on November 14, 1957, holding that the leasehold was taxable by the County, and further holding, upon its understanding of our opinion in *Offutt Housing Co. v. Sarpy County*, 351 U. S. 253.

<sup>1</sup> The Moses Lake Lease was entered into on May 31, 1950, the Larsonaire lease on August 6, 1953, and the Larson Heights lease on August 2, 1954.

MOSES LAKE HOMES v. GRANT COUNTY. 3

that it would be proper, for such purpose, to value the leasehold at "the full value of the buildings and improvements" thereon. *Moses Lake Homes, Inc., v. Grant County*, 51 Wash. 2d 285, 287.

Thereafter, in December 1957, the County valued these Wherry Act leaseholds on the basis of the full value of the buildings and improvements, and, acting under § 84.40.080, Revised Code of Washington, retrospectively assessed its taxes against the Moses Lake leasehold for the years 1955 through 1958, against the Larsonaire leasehold for the years 1956 through 1958, and against the Larson Heights leasehold for the years 1957 and 1958 as "omitted property" as authorized by that section.<sup>2</sup> Later, the County assessed and levied its taxes against the leaseholds, on the same basis, for the year 1959.<sup>3</sup>

On January 21, 1958, the County issued its distrainments, and also its notices of sales of these leaseholds and the improvements thereon to be held on March 4, 1958, to satisfy its tax demands. Very soon thereafter, the United States instituted this condemnation action in the United States District Court for the Eastern District of Washington against the lessees and Grant County, and on March 1, 1958, it filed therein its declaration of taking, and took, these leasehold estates—depositing in the regis-

<sup>2</sup> Section 84.40.080 of the Revised Code of Washington provides, in relevant part, as follows:

"The assessor . . . shall enter in the detail and assessment list of the current year any property shown to have been omitted from the assessment list of any preceding year, at the valuation of that year, or if not then valued, at such valuation as the assessor shall determine from the preceding year. . . . When such an assessment is made, the taxes levied thereon may be paid within one year of the due date of the taxes for the year in which the assessment is made without penalty or interest."

<sup>3</sup> The County's tax claims against petitioners' leaseholds were as follows: Moses Lake, \$142,285.73, Larsonaire, \$68,838, and Larson Heights, \$47,088.



#### 4 MOSES LAKE HOMES v. GRANT COUNTY.

try of the court \$253,000 as their estimated value<sup>4</sup>—and thereupon, on motion of the United States, the court enjoined Grant County from proceeding with its tax sales pending final determination of the case.

By its answer, the County claimed, and asked the court to award it, the greater part of the deposit to satisfy its tax demands.<sup>5</sup> The lessees disputed the County's claim, contending, *inter alia*, that the asserted taxes were invalid because discriminatorily assessed in violation of § 511 of the Housing Act of 1956 (70 Stat. 1091, c. 1029, 42 U. S. C. (1958 ed.) § 1594, note) and in violation of the United States Constitution. That issue, among others, was litigated between those parties as adversary codefendants.

Although the District Court found that Washington's "taxes and assessments on Wherry housing [leaseholds] are . . . levied upon a basis different and higher than [other leaseholds]," it, nevertheless, held that, but for the state court injunction, the 1955 and 1956 taxes against the Moses Lake leasehold would have been validly assessed and levied before the effective period of § 511 of the Housing Act of 1956 (June 15, 1956),<sup>6</sup> and

<sup>4</sup> The deposited sum of \$253,000 was allocated among the three petitioners as follows: Moses Lake, \$126,500; Larsonaire, \$65,300, and Larson Heights, \$61,200. Thus, the County's claims against the Moses Lake and Larsonaire leaseholders were greater than the amount deposited by the United States as their reasonable value. See note 3. Had the County been successful on all items of its claim, it would have received all but \$14,112 of the deposited sum.

<sup>5</sup> See note 4.

<sup>6</sup> Section 408, as amended by § 511 of the Housing Act of 1956 (70 Stat. 1091, c. 1029, 42 U. S. C. (1958 ed.) § 1594, note) contains the following relevant provision:

Nothing contained in the provisions of Title VIII of the National Housing Act in effect prior to August 11, 1955, or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal

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it allowed those items of the County's claim; but it denied all other items of the claim. On appeal, the Ninth Circuit "sustained [the District] Court's finding that the method used in assessing the Moses Lake leaseholds resulted in a higher tax than would have been true in the case of a non-Wherry Act leasehold," 276 F. 2d, at 847, but it held that "the fact that the taxes are higher does not invalidate the entire tax. It only requires that the amount collectible be reduced to what it would have been if the tax had been levied on a non-Wherry Act leasehold basis," 276 F. 2d, at 847, and—otherwise upholding the County's levies against the Moses Lake leasehold for the years 1955, 1956 and 1957—it remanded the case to the District Court to make the proper reduction in the amount of those taxes, and also for further proceedings respecting the other taxpayers and tax years involved, except it held that the 1959 taxes were invalid because levied on the leaseholds after the United States had acquired them.

In addition to the weight properly to be accorded to the conclusions of the two courts below that Washington imposes a higher tax on Wherry Act leaseholds than on other similar leaseholds, it is eminently clear that this is so. Section 84.40.030 of the Revised Code of Washington provides that all property shall be assessed at 50 percent of its fair value, and that "Taxable leasehold estates shall be valued at such price as they would bring at a fair, voluntary sale for cash." Consonant with that statute, the Washington Supreme Court has consistently held, save as to Wherry Act leaseholds, that all leaseholds,

Government in or with respect to any property covered by a mortgage insured under such provisions of Title VIII: *Provided*, That no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value. . . ."

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including leaseholds on the State's own tax-exempt lands, are to be valued for tax purposes on the basis of their fair market value, considering their burdens as well as their benefits. *Metropolitan Building Co. v. King County*, 72 Wash. 47, 129 P. 883; *Metropolitan Building Co. v. King County*, 64 Wash. 615, 117 P. 495; *Metropolitan Building Co. v. King County*, 62 Wash. 409, 113 P. 1114. And see *Bellingham Community Hotel Co. v. Whatcom County*, 190 Wash. 609, 612-613, 70 P. 2d 301, 303, and *Dexter Horton Bldg. Co. v. King County*, 10 Wash. 2d 186, 116 P. 2d 507.

Even the facts of the *Metropolitan* cases are remarkably similar to the facts here. There the Metropolitan Company acquired a 50-year lease of land owned by the State. As required by the lease, the lessee erected very substantial improvements upon the land—funding their cost with a large issue of mortgage bonds—which improvements, immediately upon completion, became the property of the State. In the first of those cases, 62 Wash. 409, 113 P. 1114, the Court held that the leasehold should not be assessed at a "speculative" value, but at its "actual . . . value in money . . ." and that it was error to assess it at the value of the improvements. In the two later *Metropolitan* cases (64 Wash. 615, 117 P. 495; 72 Wash. 47, 129 P. 883), the court emphasized that, in determining the fair market value of the leasehold, consideration must be given to its burdens, including mortgages upon it, as well as to its benefits.

Yet, without overruling or departing those cases with respect to state-created leaseholds, the Washington Supreme Court held in *Moses Lake Homes Co. v. Grant County*, 51 Wash. 2d 285, 317 P. 2d 1069, that Wherry Act leaseholds are taxable at "the full value of the buildings and improvements" thereon. It felt bound, as it said, to apply that special valuation rule to Wherry Act

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leaseholds because of our opinion in *Offutt Housing Co. v. Sarpy County*, 351 U. S. 253. In this, the Washington Supreme Court mistakenly read and misapplied the *Offutt* case. Nothing in that case requires the states to assess Wnerry Act leaseholds on the basis of the value of the improvements thereon. In this respect, it holds only that such a valuation is not unconstitutional *per se*. That case did not involve any issue or question of discrimination. It involved the law of Nebraska which requires all leaseholds in tax exempt property to be assessed at the full value of the buildings and improvements thereon, and the *Offutt* case held that such might constitutionally be done. It did not hold, as the Supreme Court of Washington has construed it in the *Moses Lake* case, that a State might constitutionally discriminate against leaseholds on federally owned lands in favor of leaseholds on state-owned lands.

If anything is settled in the law, it is that a State may not discriminate against the Federal Government or its lessees. See, e. g., *Phillips Co. v. Dumas School District*, 361 U. S. 376; *United States v. City of Detroit*, 355 U. S. 466, 473; *City of Detroit v. Murray Corp.*, 355 U. S. 489. In *United States v. City of Detroit*, *supra*, we said:

"It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals." 355 U. S., at 473.

The *Dumas* case, *supra*, is closely in point and controlling. There the State of Texas taxed the leasehold estate of a government lessee at the "full value of the leased premises" (361 U. S., at 378), while it imposed "a distinctly lesser burden on similarly situated lessees of exempt property owned by the State and its political

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subdivisions." 361 U. S., at 379. We there said, "[I]t does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself," 361 U. S., at 385, and we held the tax to be void because it "discriminates unconstitutionally against the United States and its lessees." 361 U. S., at 379. That case is indistinguishable from this one on the point here.

The Court of Appeals was also in error in holding that "the fact that the taxes are higher does not invalidate the entire tax [but] only requires that the amount collectible be reduced to what it would have been if the tax had been levied on a non-Wherry Act leasehold basis" (276 F. 2d, at 847), and in remanding the case to the District Court to make the necessary adjustment. We held in the *Dumas* case, *supra*, that a discriminatory tax is void and "may not be exacted." 361 U. S., at 387. The effect of the Court's remand was to direct the District Court to decree a valid tax for the invalid one which the State had attempted to exact. The District Court has no power so to decree. Federal courts may not assess or levy taxes. Only the appropriate taxing officials of Grant County may assess and levy taxes on these leaseholds, and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one. When, as here, the tax is invalid, it "may not be exacted." *Phillips Co. v. Dumas School Distr.*, 361 U. S. 387.

Nor is there any merit in respondent's contention that the opinion and judgment of the Supreme Court of Washington in the *Moses Lake* case, *supra*, is *res judicata* of the County's tax claims against the Moses Lake leasehold for at least the years 1955 and 1956. This is so because no tax whatever had then been assessed and levied against the Moses Lake leasehold, and hence no issue of discrimi-

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nation was or could have been presented and adjudicated in that case.

Inasmuch as the taxes, presently assessed and levied, discriminate unconstitutionally against the United States and its lessees, they are void, and hence may not be exacted.

*Reversed.*



**MICROCARD**

TRADE MARK



**22**



**60**



**2  
15  
4**